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AUTHORITIES.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 454.

MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, PETITIONER,

vs.

HURNI PACKING COMPANY, RESPONDENT.

ON CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

BRIEF FOR PETITIONER.

Statement of the Case.

This action was brought against the Mutual Life Insurance Company (a citizen of New York), hereinafter called the defendant, by the Hurni Pack-

ing Company (a citizen of the State of Iowa), hereinafter called the plaintiff, to recover as beneficiary the amount named in a policy of life insurance for $25,000, issued by the Insurance Company on the life of one Rudolph Hurni. The policy was applied for on the 2d day of September, 1915, but was antedated as of August 23, 1915 at the request of the applicant. Rudolph Hurni died on the 4th day of July, 1917. The action was commenced on August 28, 1917 in a District Court of Iowa, and was removed by the defendant on the ground of diversity of citizenship to the United States District Court, Northern District of Iowa.

At the close of the trial in the District Court each party moved for a directed verdict. The District Court overruled the motion of the defendant and granted the motion of the plaintiff. A verdict was directed and judgment entered in favor of the plaintiff for the full amount of the policy. On writ of error to the United States Circuit Court of Appeals, Eighth Circuit, that Court reversed the judgment, holding that the evidence showed without conflict and as a matter of law that the policy was procured by fraud, misrepresentation and concealment, and hence was void. The case was remanded for further proceedings in the District Court not inconsistent with the opinion. (260 Federal Reporter, 641.)

The plaintiff then filed in this court a petition for a writ of certiorari, which was denied. (251 U. S., 556.)

The plaintiff then filed an amended reply, setting up for the first time a provision of the policy providing a two-year limitation from the "date of issue" on the right to contest liability and it therefore claimed that the defense of fraud was no longer available to defendant. A second trial was had, the evidence being substantially the same as the evidence on the first trial. At the close of the evidence, each party moved for a directed verdict. The motion of the defendant was overruled. The motion of the plaintiff was based solely on the ground that the policy was incontestable. A verdict was directed in its favor.

To review this judgment the defendant sued out a writ of error in the United States Circuit Court of Appeals, Eighth Circuit. On April 4, 1922, the Circuit Court of Appeals, while reaffirming its previous decision to the effect that the policy had been procured by fraud, held that the policy was incontestable. From the opinion of the majority, concurred in by Lewis, Circuit Judge, and Van Valkenburgh, District Judge, Circuit Judge Sanborn dissented in an opinion. (280 Federal Rep., 22.)

Material Facts.

(1.) *On the Issue of Fraud.*

While the fraud in the procurement of the policy is not in dispute yet the facts may be briefly stated.

The policy sued on was issued pursuant to an

application made by Rudolph Hurni on the 2d day of September, 1915,

Among other things, the application contains the following provisions.

> "This application is made to the Mutual Life Insurance Company of New York. All the following statements and answers, and all those that I make to the Company's Medical Examiner, in continuation of this application, are true, and are offered to the Company as an inducement to issue the proposed policy. * * * The proposed policy shall not take effect unless and until the first premium shall have been paid during my continuance in good health, and unless also the policy shall have been delivered to and received by me during my continuance in good health."

The evidence showed that Hurni made the following statements and representations to the Medical Examiner, which were recorded in his report and formed part of Hurni's application.

> "18. What illnesses, diseases, injuries or surgical operations have you had since childhood?
>
> Name of disease, etc.: Pneumonia.
> Number of attacks: One.
> Date of each: Fall 1899.
> Duration: 3 weeks.
> Severity: Moderate.
> Results: Good.

Date of complete recovery? Don't remember date.

19. State every physician or practitioner who has prescribed for or treated you or whom you have consulted in the past five years.

Name of physician or practitioner: None consulted.

Address: ——.

When consulted: —— —, ——.

Nature of complaint: Give full details above under Q. 18.

20. Have you stated in answer to question 18 all illnesses, diseases, injuries or surgical operations which you have had since childhood? (Ans. yes or no.) Yes.

21. Have you stated in answer to question 19 every physician and practitioner consulted during the past five years and dates of consultation? (Ans. yes or no.) Yes.

22. (*a*) Are you in good health? Yes.
(*b*) If not, what is the impairment?"

The testimony shows without contradiction that Hurni had frequently consulted, and had been prescribed for and received medical treatment from Dr. C. E. Clingan, a practicing physician of Sioux City, Iowa, during the period from 1910 to 1915 inclusive. (See Trans., commencing page 22, testimony of Dr. Clingan.)

Following the peremptory direction and advice of Dr. Clingan, Hurni went to Excelsior Springs,

a health resort in Missouri, and remained there during the greater part of June, July, and August, 1914. (Trans., pp. 26, 35.) Dr. Clingan had told him that he would break down if he did not get away from his business. (Trans., p. 26.) Dr. Clingan's testimony was not contradicted. While at Excelsior Springs, Hurni consulted a Dr. Bogart, and also a Dr. Prather, and during his stay at Excelsior Springs, Hurni was treated by Dr. Prather, receiving a number of serum treatments by hypodermic injections, the number being estimated by Hurni's wife at about thirty. (See testimony of Mrs. Hurni, Trans., commencing page 37.)

Dr. Gibson, local medical examiner of the Insurance Company, testified that in recommending Hurni as a fit applicant for insurance, he relied upon the truth of the answers to the questions which Hurni had made, as well as upon the physical findings resulting from the physical examination, and that he would not have recommended Hurni as a fit applicant for insurance, had be known or had cause to know that the answers Hurni made to the questions put to him were not in fact true. (See testimony of Dr. Gibson, commencing Trans., page 27, and Trans., commencing page 43.)

(2) *On the Issue of Incontestability.*

The facts on this, the sole issue in the case, were admitted in the pleadings or were stipulated to be as follows:

The policy contained the following provision:

> "INCONTESTABILITY.—This policy shall be incontestable except for non-payment of premiums provided two years shall have elapsed from its date of issue." (Trans., page 4.)

The original application of Rudolph Hurni, upon which the policy in suit was issued, was signed and dated September 2, 1915. At the top of the application there is written in ink: "Date policy August 23, 1915. Age 47." (Trans., page 4.)

The application contains the following provision:

> "The applicant, upon request, may have policy antedated for a period not to exceed six months." (Trans., page 4.)

The policy was thus antedated at the request of the applicant and to give him the benefit of a better premium rate. (Trans., page 53.)

The application was accepted and the policy sued on was executed by the signatures of the president and secretary and the countersignature of the registrar of the Insurance Company on the 7th day of September, 1915. (Trans., page 66.)

The policy was actually delivered to Rudolph Hurni on September 13, 1915. (Trans., page 67.)

Rudolph Hurni died on the 4th day of July, 1917. (Trans., pages 2, 10.)

The plaintiff furnished proofs of death on the 19th day of August, 1917. (Trans., pages 2, 10.)

On the 24th day of August, 1917, the General Solicitor of the Insurance Company, conceded to have had full power to act for the Company, wrote a letter to the plaintiff (which was received by the addressee on August 27, 1917) asserting that because the policy was procured by the fraud of Rudolph Hurni, the defendant denied liability. (Trans., page 67.)

On these undisputed facts, the Circuit Court of Appeals held:

1. That the policy sued on was obtained by fraud.

2. That the two-year period within which the Insurance Company could contest its liability on the policy commenced to run on August 23, 1915, although that date is prior to the date of the application for the policy or the true date of its execution or delivery.

3. That the two-year period within which the Insurance Company could contest its liability on the policy continued to run notwithstanding the death of Rudolph Hurni.

4. That the Insurance Company first "contested" liability on the policy on August 24, 1917, by the formal notice of its General Solicitor, and such denial of liability being thus given one day after its right to "contest" had expired under the court's interpretation of the "date of issue," the defense of fraud was unavailable.

5. That the sending of a letter to the Packing Company by the Insurance Company, in which payment of the policy was refused, was a sufficient act of "contest" within the meaning of the incontestability clause.

Specification of Errors.

1. The Circuit Court of Appeals erred in holding that the two-year contestability period commenced to run on August 23, 1915, (the fictitious date mentioned in the *testimonium* clause), it, however, not being the true date either (1) of the application for the policy, or (2) of its execution by the defendant, or (3) its delivery to the insured.

2. It also erred in holding that, notwithstanding the insured died within the period during which the defendant is permitted under the terms of the policy to contest its liability, and notwithstanding that the rights of both insurer and insured are fixed as of the date of the death of said insured, nevertheless the two-year period of contestability continued to run from the death of the insured.

ARGUMENT.

I.

The Policy was void for fraud.

The question of fraud was litigated on the first trial and decided against the defendant. The

Circuit Court of Appeals, reviewing this decision of the trial court on a writ of error, held that there was fraud and reversed the trial court. When the case was remanded to the district court, after a writ of certiorari had been denied by the United States Supreme Court (251 U. S., 556), the existence of fraud in the procurement of the policy had become the law of the case, and was not further contested by the plaintiff. On the retrial substantially the same evidence as to Hurni's fraud was offered by the defendant and received by the trial court subject to the court's ruling on the question of law, then for the first time raised, to wit, whether the incontestability clause prevented such defense. No attempt was made by the plaintiff to preserve any right it may have had to litigate the question of fraud, nor did it raise the point that the decision by the Circuit Court of Appeals on the first submission on this question was erroneous.

On the second trial at the close of the entire case each party moved for a directed verdict and a verdict was directed for the plaintiff, not because there was no fraud shown but because the defendant could no longer urge fraud as a defense.

When both parties moved for a directed verdict each conceded that there was no disputed question of fact in the case and that there was open for decision merely a question of law, to wit, whether the defendant, in view of the incontestability clause, could urge Hurni's fraud as a defense to the claim on the policy.

It is well settled in the Federal courts that where both parties move for a directed verdict, and nothing else appears, the court must assume that each concedes there is no dispute with respect to the facts, and, where a finding of the fact is made by the trial court and there is evidence to support it, an appellate court will not review the correctness of such finding.

Williams vs. Vreeland, 250 U. S., 295, 297.
Sena vs. American Turquoise Co., 220 U. S., 497, 501.
Empire State Cattle Co. vs. Atchison, Topeka & Santa Fe Ry. Co., 210 U. S., 1, 8.
Beuttell vs. Magone, 157 U. S., 154, 157.

The rule is stated in *Williams vs. Vreeland, supra,* by Mr. Justice McReynolds, who said, page 298:

> "The established rule is, 'where both parties request a peremptory instruction and do nothing more they thereby assume the facts to be undisputed and, in effect, submit to the trial judge the determination of the inferences proper to be drawn therefrom.' And upon review, a finding of fact by the trial court under such circumstances must stand if the record disclosed substantial evidence to support it."

In the instant case, the fraud was not constructive but consisted in a deliberate and gross sup-

pression of essential facts and the statement of affirmative untruths.

II.

The two-year contestable period commenced to run either (1) on September 7, 1915, when the Policy was actually executed, or (2) on September 13, 1915, when it was delivered and took effect.

The clause in question reads as follows:

> "INCONTESTABILITY.—This policy shall be incontestable except for non-payment of premiums, *provided two years shall have elapsed from its date of issue.*"

As previously stated, the application for the policy was made September 2, 1915, and when subsequently the defendant decided to issue the policy, it was antedated to August 23, 1915, in order to give the applicant for insurance a more favorable age rating.

The *testimonium* clause of the policy was therefore made to read as follows:

> "In witness whereof, the company has caused this policy to be *executed* this 23rd day of August, 1915."

There was therefore a conceded difference between the nominal date of the policy and the actual date of issue. The former was fictitious; the latter

was a fact. The contract did not become effective or binding until its delivery to the insured. The application provides:

> "The proposed policy shall not take effect unless and until the first premium shall have been paid during my continuance in good health, and *unless also the policy shall have been delivered to and received by me during my continuance in good health.*"

The commencement of the running of the two-year contestability period is expressly stated as the *date of issue* of the policy. Thus the date of issue is specifically differentiated in the policy itself from the date of the policy.

What is the general meaning of the word "issue"? We quote from the dissenting opinion of Circuit Judge Sanborn:

> "Issue means 'to deliver for use.' A policy is not issued when it is dated and signed by the officers of the company, nor until it has been delivered to and accepted by the insured. The application for it is a request for a policy; the policy is a proposal of the company to insure on the terms specified therein; the receipt and acceptance of such a policy by the insured first closes the contract. Until that acceptance there may be negotiations, but no contract. Upon such receipt and acceptance on September 13, 1915, and not before, was there a contract in this case, and then, and not until then, was this policy issued. Then was it first 'de-

livered for use.' 4 Words and Phrases, First Series, p. 3780; *Jefferson Standard Life Ins. Co. vs. Wilson,* 260 Fed., 593; 171 C. C. A., 357; *Logsdon vs. Supreme Lodge of Fraternal Union of America,* 34 Wash., 666; 76 Pac., 292, 293; *Paine vs. Pacific Mutual Life Ins. Co.,* 51 Fed., 689, 693; 2 C. C. A., 459; *Equitable Life Assurance Co. vs. McElroy,* 83 Fed., 631, 642; 28 C. C. A., 365. The date of this policy, therefore, differed from the date of its issue. The former was August 23, 1915, and the latter was September 13, 1915."

See also:

Homestead Ins. Co. vs. Ison, 110 Va., 18, 23.
Maggett vs. Roberts, 112 N. C., 71.
Coleman vs. New England Life Ins. Co., 236 Mass., 552.
McMaster vs. New York Life Ins. Co., 183 U. S., 25.

To "issue" means "to put forth," "to emit," "to give effect to," "to deliver for use," "delivery." (Webster's Dictionary.)

Can it be reasonably doubted that the defendant intended to reserve to itself a full period of two years, within which it could discover any circumstances that would enable it to rescind or otherwise contest the contract on the ground of fraud?

When the parties to this contract of insurance were negotiating, they knew that the date which

was to be recited in the policy was to be a fictitious date and not the real date of execution. They also knew that the policy could not be "issued" on that fictitious date because it already had passed. The application was not made until September 2, 1915. The policy had to be executed at the Home Office of the Insurance Company in New York, and was so executed there on September 7, 1915. It then had to be forwarded to Sioux City, Iowa, for delivery, and it was forwarded and was delivered September 13, 1915. Then and only then it became a binding contract. Both parties had agreed that the policy should not be in force and its obligations and limitations would not begin until it was delivered and the first premium paid. It therefore was agreed that the nominal date of the policy should be anterior to the "date of issue." It never was agreed by the parties that such date of issue should be the same as a fictitious date of the policy. Such an agreement would have been impossible of fulfillment because obviously the policy could not be *issued* on August 23, 1915, that date being more than one week prior to the date it was applied for.

The parties could have agreed that the two-year contestability period should begin to run either

(1) from the fictitious date of the policy, or

(2) from the date when the policy was actually executed, or

(3) from the date when the policy was actually delivered.

In expressing their agreement they used the expression "date of issue" and themselves interpreted it by providing that the policy should not take effect unless "delivered" to the applicant. Manifestly, the policy was not "issued" until it was in force. Moreover, if the insured had refused to accept the policy when tendered, or had he refused to pay the first premium until say January 1, 1916, and the policy was then delivered, surely no one could say that the policy was issued four months before.

It must follow, therefore, that the policy was not "issued" until it was delivered or in any event until it was executed.

It is clear then, that the parties used the words "date of issue" to mean the date of delivery, *i. e.*, the date when the policy should become a binding contract or, at the earliest, the date when the Company actually executed it.

The incontestability clause, limiting as it does the right of the Insurance Company to contest its liability under the policy on the ground of fraud, is a self-imposed limitation of right, because ordinarily one always has the right to contest liability on the ground of fraud.

Being a self-imposed limitation, and for the benefit of the insurer, the clause should not be so construed as to inflict a greater limitation on the rights of the Insurance Company to defend itself against a fraud than clearly arises from the plain wording and meaning of the clause itself.

To so hold is to read out of the policy contract, by an arbitrary construction not justified by any ambiguity or inconsistency in it, the plain provision reserving to the defendant two years from the date it assumed a liability within which to contest liability.

We appreciate and concede the full force of the general rule of construction that the provisions of an insurance policy should be construed against the insurer. Were it necessary for the purposes of this case, it could be reasonably urged that the rule in question should not have the same application, or possibly any application, in cases of fraud which invalidates the contract altogether. In the view of the law, the contract, where fraud was practiced in its procurement, had no existence. Where a contract is valid, and a court is asked to enforce its provisions, there is reason for holding that, as the insurer dictates the terms of the contract, any fair doubt should be resolved in favor of the insured.

But does this rule apply with equal force, where the entire contract, including the incontestability provision, is void by reason of the fraud of the insured in procuring the contract?

Public policy does require that as the rights of the insured should be protected, the many provisions of an insurance policy should be in cases of doubt resolved against the insurer; but does public policy require that, where the defense to the policy

is that it is void on the ground of fraud, that a clause of the void contract, which limits the power to prove the fraud, should be construed against the insurer and in favor of the insured?

However, this case does not require a decision of this point; for, conceding *arguendo* that the incontestability provision must be construed as favorably to the insured as any other executory clause, this rule does not require an unreasonable construction, which would facilitate a fraud.

The real question is, what did the parties fairly intend by the language of their contract?

Such intention must not be nullified by a fanciful perversion of language. Words are, at best, uncertain vehicles of thought, and, in commercial contracts, few covenants can be phrased that cannot be tortured into absurd meanings. The rule in question does not mean that language shall be juggled with in order to compel the insurer to do something that it did not promise to do, or submit to a conceded fraud.

Having in mind the purpose of the contract and the particular provision which may require construction, the cardinal rule of interpretation is to give it a fair and reasonable interpretation. Where of two such constructions, one enables an unquestioned fraud to be perpetrated, and the other facilitates its detection, there should be less reason to give the insured a construction that enables him to defraud the insurer.

We submit that the fair and unmistakable intention of the parties was that, when the Company assumed responsibility, it should have *two full years* thereafter to determine whether the insured had practiced any fraud upon the insurer. To reduce this limitation by dating it from an anterior and fictitious date, not only reduces the two years which the parties manifestly had in mind, but it might altogether destroy such right of rescission.

This can be shown by a very possible illustration.

Suppose this clause had provided that the policy would only be contestable within six months from the date of issue, and suppose further that the policy had been dated back six months from the time of its actual execution.

In such a case, could it reasonably be contended that, when the parties agreed that the insurer should have six months to ascertain whether a fraud had been practiced upon it, that nevertheless the provision was valueless because the time had expired before the contract of insurance even began? Such a construction would wholly nullify the right of the insurer to protect itself against fraud.

In such a case, no court would hesitate to say ~~that~~ when a period of six months was given to contest the policy, that the provision meant what it said, and that if, leaving such clause in the policy, the policy was dated back six months before the contract of insurance was in fact made,

~~that~~ the six months' period commenced to run from the time that the minds of the parties met.

Such a case differs only in degree from the instant case; for, while the ruling of the court below did not altogether destroy the time which the insurer reserved for the detection of fraud, yet it has operated to cut it down, and thus to impair the reserved right of the defendant to protect itself from fraud. In this case it has operated to perpetrate a fraud on the insurer.

It is a fundamental rule of construction of a contract that all the words, terms and provisions thereof shall be given effect, if possible, and, to quote again from the dissenting opinion of Circuit Judge Sanborn:

> "Where a contract is susceptible of two constructions—one of which makes the different parts of it accordant and another which makes them discordant—the former should be preferred, because it cannot be assumed that the parties intended to insert inconsistent provisions. *Burdon Central Sugar Refining Co. vs. Payne,* 167 U. S., 127, 142; 17 Sup. Ct., 754; 42 L. Ed., 105; *Miller et al. vs. Hannibal & St. Joe R. Co.,* 90 N. Y., 430, 433; 43 Am. Rep., 179; *Barhydt vs. Ellis,* 45 N. Y., 107, 110."

Applying the above rule to the insurance contract here in question, we have a recital in the *testimonium* clause of a date known to the contracting parties to be fictitious, and we have in the incon-

testability clause a provision that the policy shall be incontestable after two years shall have elapsed from the date of issue. By construing the "date of issue" to mean either the date of actual execution, or the date of delivery, when the policy by its terms took effect, and not the fictitious date of execution, each expression is given its rational meaning and the provisions are accordant and harmonious.

III.

The death of the insured matured the policy and the rights of the parties thereto became fixed at such death and the incontestability clause could not become operative.

Where the insured dies before the period of contestability has expired, the Insurance Company is precluded from bringing an action to rescind for the reason that it has an adequate remedy at law, in that all the grounds for such rescission may be set up as a defense in an action at law brought to enforce the contract.

Cable vs. U. S. Life, 191 U. S., 288;
Insurance Co. vs. Bailey, 13 Wall., 616;
Griesa vs. Mutual Life Ins. Co., 169 Fed., 509;
Riggs vs. Union Life Ins. Co., 129 Fed., 207;
Jefferson Standard Life vs. McIntyre, 285 Fed., 570.

Jefferson Standard Life Ins. Company v. Smith, 248 S.W. 897, (Arkansas, 1923)
See Addendum, post p. 55.

If the rights of all parties became fixed by the death of the insured on July 4, 1917, the necessity of determining the date when the incontestability clause commenced to run, ceases, as the insured admittedly died before two years had expired, whether the period is measured from August 23d, 1915, the fictitious date of the policy, or from September 13th, 1915, the date of delivery of the policy.

There is a line of State authorities holding that such a clause is applicable notwithstanding the policy holder may die before the expiration of the contestability period. It is this rule of construction that we attack as erroneous. *We contend that under the clause in question, the insured must have lived until the expiration of the period in order to make the policy incontestable.*

The only federal court decision on this important question is the recent case of *Jefferson Standard Life vs. McIntyre,* 285 Fed., 570. In that case the District Court of the Southern District of Florida held that a similar clause "contemplates the continuance in life of the assured" during the period of limitation.

The rule that death of the insured stops the running of the contestability period is a necessary implication of the decisions of this court in *Cable vs. U. S. Life Ins. Co.,* 191 U. S., 288, and *Phoenix Ins. Co. vs. Bailey,* 13 Wall., 616, holding that after death the insurance company cannot bring a suit in equity to rescind for fraud for the reason that it has a plain, adequate and complete remedy at

law by setting up the fraud as a defense in the law action. This rule has been followed in *Griesa vs. Mutual Life Ins. Co.*, 169 Fed. Rep., 509, and *Riggs vs. Union Life Ins. Co.*, 129 Fed. Rep., 207.

See also Fed. Jud. Code, §§ 267 and 274*b*.

If the insurance company must wait until the action at law is commenced and assert its defense of fraud in that action and such remedy is plain, adequate and complete, the rule must rest upon the fact that the rights of both insurance company and beneficiary are fixed by the maturing of the policy through the death of the insured.

There is no doubt that in numerous cases, in both Federal and State Courts, the question was involved but passed over *sub silentio*. As examples of such cases the following may be mentioned as typical.

In *Aetna Life Ins. Co. vs. Moore*, 231 U. S., 543, the record of this case shows that the policy involved contained a one-year incontestability clause, and bore date July 15, 1905, and that the insured died May 27, 1906, *i. e.*, shortly before the end of the period of contestability. Suit was not commenced until May 25, 1907, and the insurance company's answer was not filed until November 30, 1908; so that there was no judicial contest by the company until long after the period of contestability had expired. A similar state of facts existed in *Prudential Ins. Co. vs. Moore*, 231 U. S., 560. An examination of the records in these cases dis-

closes no evidence of any extra-judicial "contest" before the one-year contestability period expired. It may therefore be properly assumed that in the said cases all parties assumed that the insurance company was not precluded from asserting its meritorious defense by reason of its failure to contest liability either in court or out of court before the expiration of one year from the date of the policy.

The incontestability clause cannot always be given a strictly literal construction in order to fix the date when the contestability period expires. Otherwise, it would often operate to terminate a litigation in the very midst of a trial. If the two-year period of contestability happened to expire while a trial was in progress, the plaintiff's counsel might rise and suggest to the court that two years having just expired, the policy was no longer contestable and that therefore the defendant's defenses were no longer available. But such a ~~put~~ theory would be a plain absurdity.

But a literal construction is precisely what the plaintiff in the case at bar is contending for. Such construction ignores the fundamental fact that in case of a life insurance policy, the death of the insured is the crucial and decisive fact determining the rights and duties of the contracting parties.

There are many cogent reasons why it may be said that it is the intention of the contracting parties to the contract of insurance that the insured must live two years in order to make the in-

contestability clause applicable. Against these there can be advanced no reason except that generally speaking, a policy will be construed, in case of an ambiguity, against the insurance company and in favor of the claimant. In the class of cases such as the instant case, there exists no reason for unreasonably applying this rule of construction against the party who has been the victim of fraud and deceit.

Here we have established as a matter of law and fact that this policy sued upon was obtained by fraud and that the alleged contract was wholly void, and we have, at the eleventh hour, a claim of incontestability asserted by the plaintiff, based upon a fictitious date. Such a claim is as lacking in merit as is the claim upon the void policy.

The main error in the decisions of some State courts, which hold the incontestability clause applicable notwithstanding the death of the insured during the contestability period, is in failing to differentiate between the policy of insurance, as such, and the obligation arising therefrom between the claimant and the insurance company after the death of the insured.

A contract of insurance necessarily imports, among other things, a so-called "risk." Where there is no risk, there can be no insurance. After the insured is dead, there is no longer any risk. What before was a hazard and an uncertainty has become a certainty. Upon the death of a person,

whose life is insured, the rights under the policy become fixed. The contract is no longer one of insurance, but of payment, if the policy is valid.

Risk and insurance are strictly correlative. Insurance can not exist without risk, and upon cessation of the risk, the insurance ceases to exist as such.

The fundamental effect on the insurance contract of the happening of the event insured against is well illustrated by the manner in which the courts have treated provisions in fire insurance policies prohibiting assignment without the consent of the insurance company.

In *Mellen vs. Hamilton Fire Ins. Co.*, 17 N. Y., 609, the Court of Appeals in considering a clause in a fire insurance policy prohibiting an assignment without the consent in writing of the insurance company, said (p. 615):

> "The restrictive clause in the policy, upon which the objection is founded, refers only to an assignment of the policy during the *pendency of the risks* and accompanying the transfer of an interest in the property insured, and, thus interpreted, there are evident reasons for its introduction; but where the assignment is made, as in the case before us, *when the risks have ended,* and for the sole purpose of enabling the assignee to recover a loss, it is in reality no more than an assignment of a debt, which, as the company has no motive of interest for preventing, it would be unreasonable to suppose was meant to be prohibited." (Italics ours.)

It will be seen that the court clearly recognizes the essential difference which exists between an insurance policy during the pendency of the risk and the liability or cause of action arising under the policy upon the termination of the risk.

When an insurance company enters into a contract of insurance with a policyholder, it thereby undertakes the risk of insuring his life. It undertakes to pay the sum named in the policy to the beneficiary upon the contingency of death, provided the policy is then in force. Such is the general character of the contract in its inception.

By the incontestability clause the Insurance Company undertakes that, provided it continues to insure against the risk for a period of two years after the policy is issued, thereafter it will make no defense against a claim under the policy. It is therefore obvious that the risk must continue for the period of two years. If the risk does not continue in force for two years then the incontestability clause never can become applicable.

To state the proposition another way:

The insurance company limits its right to cancel or rescind the policy for any reason whatsoever, except for the non-payment of premiums, to a period of two years, provided the policy exists as a policy of insurance for that time. After two years have elapsed from the date of issue, the policy cannot be rescinded except for the non-payment of premiums; and in the event of the death of the insured

after two years, the obligation to pay becomes absolute.

It is obvious that the Insurance Company intended to reserve to itself the privilege of investigation to determine whether or not it desired to continue the risk. The period of time during which it might investigate, is limited to two years.

If the insured dies before the two year period of contestability (and incidentally the period wherein investigation could be made), the Insurance Company would not be able to make as full and complete an investigation as if the insured were alive and able perhaps to answer questions or be under observation. Moreover the Company can neither begin suit or give notice of rescission until legal representatives are appointed for the deceased insured. Time thus elapses. Therefore, to hold the incontestability clause as continuing to run is certainly to deprive the Insurance Company of a right; a right which the Insurance Company by its own act had limited in its operation, because without the limitation, the Insurance Company could at all times contest a policy for fraud in the inception of it.

It seems manifestly unjust and inequitable, that where the Insurance Company has so limited its right of cancellation and rescission, that it should be put to a further limitation of its rights in the premises, by depriving it of possibly the most important avenue of investigation that might be open to it, viz.; the opportunity of further examining

and interrogating the insured or observing his conduct.

We submit the foregoing as illustrative of the error in the decisions which declare a contrary rule. There never was a contract *with the beneficiary* that the policy should ever be incontestable. There was a contract *with the insured* that the policy should be incontestable provided the contract relationship between the insured and the Insurance Company continued during the lifetime of the insured for the period of two years.

Our construction of the contract is much more reasonable and just, than the construction which holds that the incontestability clause is effective notwithstanding that the insured dies within the two-year period.

IV.

Notice by the Insurance Company denying liability on the policy was a "contest" and prevents the assertion of an estoppel under the incontestability clause.

The court below (all three judges concurring) correctly held that the letter of August 24, 1917, written by Frederick L. Allen, the General Solicitor of the Insurance Company, to the plaintiff Company was a sufficient act of "contest." The only possible interpretation of this letter is that the Insurance Company contested the right of the Packing Company to demand payment under the policy. That is sufficient. To contest a policy means to

repudiate it, to claim that it is unenforcible, to deny that it is a binding contract. *Mutual Life Ins. Co. vs. Hurni Packing Co.,* 280 Fed., 18; *Jefferson Standard Life vs. McIntyre,* 285 Fed., 570.

The authorities holding that a repudiation of an executory contract by one of the contracting parties gives to the other party a right to sue immediately for a breach on the theory that the contract is at an end for all purposes except to enable the aggrieved party to recover his damages are in principle analogous and should be controlling.

It is certainly unreasonable to hold that the language of the incontestability clause required the Insurance Company to contest by a court proceeding. The clause says nothing about a contest, judicial or otherwise. It simply destroys a possible defense to the claim of the insured. The limitation refers to available defenses, not to actions or denials of liability. We do not understand that the sufficiency of the contest is longer disputed.

If, however, the letter of the General Solicitor of the Insurance Company, denying liability under the policy to the Packing Company, was not a sufficient contest, the fact that the action at law to recover on the policy was commenced on August 28, 1917, and within two years after the date of issue, as hereinbefore interpreted, and the timely filing of the defendant's answer on December 13, 1917, together constitute a contest within the period of limitation. After an action at law has been

started it is held generally by the courts that no action in equity will lie to cancel the policy because the Insurance Company has a complete and adequate remedy at law, in that it may set up in such action at law all of the facts upon which it relies for a cancellation of the policy in the equity suit. It follows, therefore, that on and after August 28, 1917, the Insurance Company was precluded from invoking the jurisdiction of a court of equity to cancel the policy and was compelled to defend the action at law and could take no other or different means of contesting the policy. When, therefore, the defendant filed its answer on December 13, 1917, it seasonably contested its liability on the policy. It would be unreasonable to require the Insurance Company to file its answer on or before September 13, 1917, when the rules of practice of the court did not require it to do so.

V.

Conclusion.

The questions hereinbefore discussed are important and at least one of them is novel in the Federal Courts. Similar clauses are to be found in millions of policies of life insurance, and similar questions to those in the instant case are frequently arising. Furthermore, there is a conflict of decision between the Federal courts of the Fifth Circuit and the Eighth Circuit on the questions (1) whether the running of the incontestability period

began at the date of the policy or the date of delivery, and (2) whether the death of the insured during the incontestability period fixed the rights of the parties and rendered the incontestability clause inoperative. (See, on the first question, *Mutual Life Ins. Co. of N. Y. vs. Hurni Packing Co.,* 280 Fed., 18, and *Jefferson Standard Life vs. Wilson,* 260 Fed., 593; and on the second question, *Mutual Life Ins. Co. of N. Y. vs. Hurni Packing Co.,* 280 Fed., 18, and *Jefferson Standard Life vs. McIntyre,* 285 Fed., 570.)

We respectfully submit that justice requires that the appellant's contentions as to all those questions should be sustained. Public policy requires that the door should be closed, not further opened, to the too prevalent frauds upon life insurance companies. These incontestability clauses, if loosely construed, are an incentive to men to make false representations on the gamble that their falsity will not be discovered within the short period of limitation.

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Addendum.

Since this brief was prepared and printed there was published a decision of the Supreme Court of Arkansas in the case of *Jefferson Standard Life Ins. Co. vs. Smith,* 248 S. W., 897, which was handed down on March 12, 1923. This case is a direct authority in favor of the proposition which we have urged in Point III of the brief.

In this case the insurance company, on April 15, 1920, issued to Smith, as beneficiary, a policy on the life of his wife. The policy contained this clause:

> "After this policy shall be in force for one full year from the date hereof it shall be incontestable for any cause except for nonpayment of premiums."

The insured died March 5, 1921, and on April 13, 1921, two days before the contestability period expired, the company brought suit to cancel the policy for fraud. On June 30, 1921, a suit at law was started to recover on the policy.

The chancery court transferred the equity suit and it was then consolidated with the suit at law. On the trial judgment was directed in favor of the beneficiary on the ground that a year had expired before the suit at law was brought on the policy. In reversing the judgment the court says:

> (1) "Instead of transferring the suit to cancel the policy to the circuit court, that suit should have been dismissed, for the rea-

son that the death of the insured fixed the rights and liabilities of both the insurer and the insured * * * ."

(2) "But inasmuch as the insured died before the year had expired, the incontestable clause did not apply, and the fact that the suit was not brought until after the first anniversary of the policy is unimportant, for, as we have said, the rights and liabilities of the parties under the insurance contract had been fixed by the death of the insured."

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SUBJECT INDEX.

TABLE OF CASES.

No. 454.

Supreme Court of the United States.

OCTOBER TERM, 1923.

MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, PETITIONER,

VS.

HURNI PACKING COMPANY, RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

Nature of Action.

This action was brought by the Hurni Packing Company, hereinafter designated Packing Company, as beneficiary in a policy of life insurance for the sum of $25,000 issued by the Mutual Life Insurance Company of New York, hereinafter designated Insurance Company, upon the life of Rudolph Hurni.

The Issues.

The respondent brought this action at law in the District Court of Woodbury County, Iowa, alleging that

it was a corporation organized under the laws of the State of Iowa; that the Insurance Company was a corporation organized under the laws of the State of New York, and engaged in the life insurance business; that a policy was issued and delivered on or about the 23rd day of August 1915, insuring the life of Rudolph Hurni for the sum of $25,000; that he died on July 4, 1917, the policy then being in full force; that on or about the 19th day of August, 1917, the Insurance Company was furnished with due proofs of death, and that notwithstanding these facts the Insurance Company refused to pay the amount due under the policy. The Packing Company therefore asked judgment for $25,000 with interest from August 19, 1917, and costs. A copy of the policy was attached to the petition, the material parts of which are as follows:

"THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, in consideration of the annual premium of one thousand and sixty nine and 75/100 dollars, the receipt of which is hereby acknowledged, and of the payment of a like amount upon each 23rd day of August hereafter until the death of the insured, promises to pay upon receipt of due proof of the death of Rudolph Hurni * * * the amount of twenty five thousand dollars, * * * to Hurni Packing Company of Sioux City, Iowa. * * *

"All premiums are payable in advance at said home office, or to any agent of the company upon delivery on or before the date due of the receipt signed by the president * * * and countersigned by said agent. * * *

"SUICIDE. The company shall not be liable hereunder in the event of the insured's death by his own act, whether sane or insane, during the period of one year after the date of issue of this policy, as set forth in the provisions of the application endorsed hereon, or attached hereto.

"INCONTESTABILITY. This policy shall be incontestable except for non-payment of premiums provided two years shall have elapsed from its date of issue.

"IN WITNESS WHEREOF the company has caused this policy to be executed this 23rd day of August, 1915" (Trans. pp. 1-6, 71-73).

The application, which is expressly made a part of the policy, contains the following:

"Application of Rudolph Hurni for insurance.

"Date of policy August 23, 1915; Age 47. This application is made to the Mutual Life Insurance Company of New York.

"I agree that any policy the company may issue upon this application shall contain the following clause:

" 'If the insured shall engage in such military or naval service * * * within the first policy year, and shall die within one year of the date of the beginning of such service * * * the company's liability hereunder shall be limited to one-fifth of the face of the policy.'

"During the period of one year following the date of issue of the policy, for which application is made, I will not engage in any of the following extra hazardous occupations * * *. It is understood and agreed that the risk of death will not be covered by the policy if

such death occurs by my own act, whether sane or insane during the period of one year next following the date of issue."

Application was made by the Insurance Company for an order of removal of the cause to the Federal Court, and upon removal the Insurance Company filed its answer alleging in substance that the policy was obtained by Rudolph Hurni through fraud and misrepresentations, and alleged further as follows:

"That defendant has heretofore made in writing a legal offer and tender to return the premiums paid to it in accordance with the terms and conditions of said policy, together with legal interest thereon, which said offer and tender the plaintiff refused, and still refuses to accept. That defendant is at all times willing, able and ready to repay to plaintiff, or to whomsoever may be entitled thereto, the amount of the premiums paid to it, together with interest in accordance with its written offer, and will ever be ready, able and willing to so repay said premiums, and interest" (Trans. pp. 11, 13, 15).

The prayer of the answer is as follows:

"Wherefore defendant prays that the policy sued on be declared null and void, and of no force and validity, and that plaintiff's petition be dismissed at its costs, and prays judgment for the costs incurred by the defendant" (Trans. pp. 11, 13, 15).

The Packing Company filed its reply admitting that tender had been made, but denying the allegations relating to fraud and misrepresentations, and alleging that the Insurance Company was estopped from claiming that

the insured was not in good health at the time the policy was issued, such estoppel being based upon the fact that the insured had been examined by the medical examiner of the Insurance Company, and declared to be a fit subject for insurance (Trans. pp. 15, 16).

Prior to the second trial in the United States District Court the Packing Company filed the following amendment to its reply:

"Comes now the plaintiff, leave of court first having been granted, and amends its reply as follows:

"The plaintiff states that the defendant failed to contest the policy of life insurance, payable to the plaintiff by the tender of the return of the premiums paid or otherwise, within the two year period in which the policy might be contested, as provided by the terms thereof, and it is now barred from setting up or urging any of the defenses set forth in its answer" (Trans. pp. 17).

Statement of Facts in Chronological Order.

August 23, 1915: Date of policy, which recites "Mutual Life Insurance Company of New York, in consideration of the annual premium of one thousand and sixty-nine and 75/100 dollars, the receipt of which is hereby acknowledged, and of the payment of a like amount upon each 23rd day of August hereafter, until the death of the insured, promises to pay * * * twenty-five thousand dollars * * * to R. Hurni Packing Company, * * *

IN WITNESS WHEREOF *the Company has*

caused this policy to be executed this 23rd day of August, 1915."

September 2, 1915: Date of application for insurance which recitess "Date of policy, August 23, 1915. Age 47" (Trans. pp. 4, 71).

September 3, 1915: Date of medical examiners report (Trans. pp. 4, 8, 71, 77).

September 7, 1915: Policy executed by officers of Insurance Company (Trans. p. 66).

July 4, 1917: Rudolph Hurni died (Trans. p. 21).

August 19, 1917: Insurance Company furnished with proofs of death (Trans. pp. 2, 10).

August 24, 1917: Date of letter from Insurance Company refusing payment of policy (Trans. p. 70).

August 27, 1917: Letter of August 24, received by Hurni Packing Company, in which Insurance Company refused to pay policy (Trans. pp. 67, 70).

August 28, 1917: Action commenced on policy by service of notice upon the Commissioner of Insurance (Trans. p. 9).

September 11, 1917: Petition of Hurni Packing Company filed in District Court, Woodbury County, Iowa (Trans. p. 8).

November 5, 1917: Date of order of removal from said court to United States District Court (Trans. p. 9).

November 12, 1917: Defendant made written tender to the Packing Company of the two premiums paid in the sum of $2150.00, with interest at 6 per cent from the date of payments to the date of tender (Trans. p. 54).

December 3, 1917: Removal transcript filed in the office of the clerk of the United States District Court (Trans. p. 1).

December 13, 1917: Insurance Company filed its answer alleging fraud and misrepresentation on the part of Rudolph Hurni in obtaining the policy (Trans. p. 10).

Previous Trials and Determinations of Cause.

The first trial of the cause in the United States District Court resulted in a directed verdict for the Packing Company. The Insurance Company took a writ of error to the Circuit Court of Appeals, where the trial court was reversed, and a new trial ordered, the Circuit Court holding that "the answer (to certain questions) having been untrue and the matter material, and the maker of the statement necessarily knowing that it was untrue when he made it, the intention to deceive the insurer is necessarily implied as the natural consequence of such act. * * * On the evidence as presented, the court should have directed a verdict for the defendant" (260 Fed. 641). An attempt was made to obtain from this court a writ of certiorari to the Circuit Court of Appeals, the Insurance Company *resisting upon the ground that no final judgment had been entered below.* This court in denying the writ may have done so on that ground.

After the case was remanded for new trial the Packing Company filed the amendment to its reply as above stated, thus for the first time meeting the Insur-

ance Company's defense of fraud by alleging that it was barred from doing so, because it had not "contested" the policy on that ground within the two year contestable period provided for. In this trial additional evidence was introduced by the Packing Company to show that there was no intention on the part of Mr. Hurni to defraud the Insurance Company. At the close of the testimony, counsel for the Packing Company made the following motion:

"Now at this time to-wit, at the close of the taking of all of the testimony in the cause, plaintiff moves the court to direct a verdict in favor of the plaintiff for the amount sought to be recovered, on the ground that the evidence and the record in the cause, shows without dispute that the defendant did not within the two-year contestable period, take any affirmative action to cancel the policy or take any action whatsoever to cancel or annul the same, and in fact failed to tender back the premium until the 12th of November, 1917, or to take any other steps whatsoever for the purpose of contesting, cancelling or rescinding the policy of insurance upon which this action is brought, on any of the grounds set up as a defense, as required by the following provision of the policy, to-wit: 'This policy shall be incontestable, except for non-payment of premiums, provided two years shall have elapsed from the date of its issue.' "

The trial court in ruling upon that motion stated as follows:

"I have reached the conclusion that the plaintiff is entitled to recover from the defendant the amount of

this policy which is something like $25,000.00, and I want counsel to compute the amount of the verdict * * * It is the opinion of the court that upon the facts as disclosed by the testimony in this case, and the proceedings of the parties * * * the plaintiff is entitled to recover, and it will be your duty to return your verdict accordingly."

The Insurance Company again took the cause on writ of error to the Circuit Court of Appeals, and that court affirmed the judgment of the trial court (280 Fed. 18), and the cause is now in this court on certiorari brought by the Insurance Company.

ERRORS RELIED UPON BY PETITIONER RESTATED.

Counsel for the petitioner, as grounds for review, have assigned certain alleged errors on the part of the Circuit Court of Appeals. The errors assigned are in substance as follows:

Par. 1. The Circuit Court of Appeals erred in holding that the two year "contestable" period commenced to run on August 23, 1915, the date mentioned in the policy as the date on which it was executed.

Par. 2. That it erred in placing the construction upon the policy which limited the right of the Insurance Company to contest it to a period of "less than two years from its date of issue."

Par. 3. That it erred in holding that, notwithstanding the fact that the insured died within the contestable period, the period continues to run, "and unless the Insurance Company contests the liability before the expiration of said period, regardless of the death of the insured, the right to do so is gone."

Counsel for the respondent insist that the trial court, and the Circuit Court of Appeals, have both placed the proper construction upon the provisions of the insurance contract for the following reasons:

BRIEF.

I.

"A provision in a contract of insurance limiting the time in which the insurer may take advantage of certain facts that might otherwise constitute a good defense to its liability on such contract, precludes every defense to the policy other than the defenses excepted in the provision itself, including false answers in the application, and even fraud where the time fixed by the contract is not unreasonably short."

14 R. C. L. 1200.

Mutual Res. Fund Life Ass'n v. *Austin*, (C. C. A.) 142 Fed. 398, 6 L. N. S. 1064.

Arnold v. *Equitable Life Ins. Co.*, 228 Fed. 157.

Great Western Life Ins. Co. v. *Snavely*, (C. C. A.) 206 Fed. 20, 46 L. N. S. 1056.

Wright v. *Mutual B. Life Ins. Co.*, 118 N. Y. 237, 6 L. R. A. 731.

Bates v. *United Life Ins. Co.*, 68 Hun. (N. Y.) 144, 22 N. Y. Supp. 626, affirmed in 37 N. E. 824.

Teeter v. *United States Life Ins. Co.*, 159 N. Y. 411, 54 N. E. 72.

Metropolitan Life Ins. Co. v. *Peeler*, (Okla.) 176 Pac. 939, 6 A. L. R. 441, 447.

Dibble v. *Reliance L. Ins. Co.*, 170 Cal. 199, 149 Pac. 171.

Prudential Life Ins. Co. v. *Lear*, 31 App. D. C. 184.

Mass. Benefit Life Ins. Co. v. *Robinson*, (Ga) 42 L. R. A. 261, 30 S. E. 918.

Weil v. *Federal Life Ins. Co.*, 264 Ill. 425, 106 N. E. 246, Ann. Cas. 1915 D. 974.
Royal Circle v. *Acterrath*, 204 Ill. 549, 68 N. E. 492, 63 L. R. A. 452.
Murray v. *State Mut. Ins. Co.*, (R. I.), 48 Atl. 800, 53 L. R. A. 742.
Clement v. *New York Life Ins. Co.*, (Tenn.) 46 S. W. 561, 42 L. R. A. 247.
Am. Nat'l Ins. Co. v. *Briggs*, (Tex. Civ. App.) 156 S. W. 909.
Welch v. *Union Cent. Life Ins. Co.*, 108 Iowa 224, 230.
Citizens Life Ins. Co. v. *McClure*, 127 S. W. 749, 27 L. N. S. 1026, 138 Ky. 138.
Mutual Life Ins. Co. v. *Buford*, (Okla.) 160 Pac. 928.
Flanagan v. *Federal Life Ins. Co.*, 231 Ill. 399, 83 N. E. 178.
Indiana Life Ins. Co. v. *McGinnis*, 180 Ind. 9, 45 L. N. S. 192, 101 N. E. 289.
Commercial Life Ins. Co. v. *McGinnis*, 50 Ind. A. 630, 97 N. E. 1018.
Mutual Life Ins. Co. v. *New*, 125 La. 41, 51 So. 61, 27 L. N. S. 431.
Reagan v. *Union Mut. Life Ins. Co.*, 189 Mass. 555, 2 L. N. S. 821, 76 N. E. 217.
Drews v. *Metropolitan Life Ins. Co.*, 79 N. J. L. 398, 75 Atl. 167.

The incontestable clause is in reality a waiver, for a consideration, of the right to make defense, and not a limitation.

Metropolitan Life Ins. Co. v. *Peeler*, (Okla.) 176 Pac. 939, 6 A. L. R. 441.
Clement v. *New York Life Ins. Co.*, (Tenn.) 46 S. W. 561, 42 L. R. A. 247, 249.
Commercial Life Ins. Co. v. *McGinnis*, 50 Ind. A. 630, 97 N. E. 1018, 1019.

The clause is adopted by insurance companies for the purpose of allaying the apprehensions of the insured, and thus enabling the companies to increase their business.

Mutual Res. Fund Life Ass'n. v. *Austin,* (C. C. A.) 140 Fed. 398, 6 L. N. S. 1064.
American Trust Co. v. *Life Ins. Co.,* 173 N. Car. 558, 92 S. E. 706.
Duvall v. *National Life Ins. Co.,* 28 Idaho 356, 154 Pac. 632, L. R. A. 1917 E. 333.
Mutual Life Ins. Co. v. *New,* 125 La. 41, 51 So. 61, 27 L. N. S. 431, 434.

"The object of the clause is plain and laudable—to create an absolute assurance of the benefit, as free as may be from any dispute of fact except the fact of death, and as soon as it reasonably can be done."

Mutual Life Ins. Co. v. *Johnson,* 254 U. S. 96, 65 L. Ed. 155.

Even though fraud be shown in the inception of the policy, neither the policy nor the incontestable clause is void *ab initio.*

Carpenter v. *Providence Ins. Co.,* 16 Pet. 495, 509; 10 L. Ed. 1044, 1050.
Mutual Res. Fund Life Ass'n. v. *Austin,* (C. C. A.), 142 Fed. 398, 6 L. N. S. 1064.
Mohr v. *Prudential Life etc. Co.,* 32 R. I. 177, 78 Atl. 554.
Commercial Ins. Co. v. *McGinnis,* 50 Ind. A. 630, 97 N. E. 1018.
Drews v. *Ins. Co.,* 79 N. J. L. 398, 75 Atl. 167, 168.
New York Life Ins. Co. v. *Baker,* (C. C. A.), 83 Fed. 647, 27 C. C. A. 658.

II.

The contestable period is to be computed from the date the policy bears, not from the day of delivery, and the stipulated two year period ends two years from the former date.

14 R. C. L. 1201, 1233.

Mass. Benefit Life Ins. Co. v. *Robinson,* (Ga.), 42 L. R. A. 261, 30 S. E. 918.

Anderson v. *Mutual Life Ins. Co.,* 164 Cal. 712, 130 Pac. 726.

Harrington v. *Mutual Life Ins. Co.,* 21 N. D. 447, 131 N. W. 246, 34 L. N. S. 373.

Meridian Life Ins. Co. v. *Milam,* 172 Ky. 75, 188 S. W. 879, L. R. A. 1917 B. 103.

Monahan v. *Fidelity Mut. Life Ins. Co.,* 242 Ill. 488, 90 N. E. 213, 214.

Wood v. *American Yeoman,* 148 Iowa 400, 404.

The authorities hold that "its date of issue" means the date of execution as stated in the instrument.

Commercial Mutual Marine Co. v. *Union Mut. Ins. Co.,* 19 How. 319, 15 L. Ed. 636, 638.

Wright v. *East Riverside Irrigation Dist.,* (C. C. A.) 138 Fed. 313.

State v. *Blease,* 95 S. C. 403, 79 S. E. 247.

Yessler v. *Seattle,* 1 Wash. 308, 25 Pac. 1014.

Starr v. *New York Mut. Life Ins. Co.,* 41 Wash. 228, 83 Pac. 116.

Turner v. *Roseberry,* (Idaho) 198 Pac. 465.

Gage v. *McCord,* (Ariz.) 51 Pac. 977, 979.

Union Ins. Co. v. *American Fire Ins. Co.,* (Cal.) 40 Pac. 431, 28 L. R. A. 692, 693.

American Bridge Co. v. *Wheeler,* 35 Wash. 40, 76 Pac. 534.

Wood v. *American Yeoman,* 148 Iowa 400.

"Its date of issue" does not mean the date of the delivery.

Kansas Mutual Life Ins. Co. v. *Coalson,* 22 Tex. Civ. App. 64, 54 S. W. 388, 392.
Stringham v. *Mutual Life Ins. Co. of N. Y.,* 44 Ore. 447, 75 Pac. 822, 825.
Hubbard v. *The Hartford Fire Ins. Co.,* 33 Iowa 325, 329.

If there is any doubt as to the meaning of the words "its date of issue" under these rules they should be construed to mean the date of the instrument rather than the date of the application, or date of delivery.

III.

"One of the rules to be observed in the interpretation of contracts of this class is that they are to be liberally construed in favor of the insured and all doubts or ambiguities resolved against the one who prepared the contract."

McMaster v. *New York Life Ins. Co.,* 78 Fed. 33.
Shearer v. *Manhattan Life Ins. Co.,* 16 Fed. 720.
Mer Rouge State Bank v. *Ins. Co.,* (C. C. A.), 270 Fed. 567, 569.
Arnold v. *Ins. Co.,* 228 Fed. 157, 161.
First National Bank v. *Hartford Co.,* 95 U. S. 673, 24 L. Ed. 563.
Thompson v. *Phoenix Ins. Co.,* 136 U. S. 287, 34 L. Ed. 408.
Kelly v. *Mutual Life Ins. Co.,* 109 Fed. 56, 58.
Mareck v. *Mutual Reserve Ass'n.,* 62 Minn. 39, 64 N. W. 68, 69.

First National Bank v. *Hartford Fire Ins. Co.*, 95 U. S. 673, 24 L. Ed. 563, 565.
Kascoutas v. *Federal Life Ins. Co.*, 189 Ia. 889, 179 N. W. 133.
Jones v. *Continental Casualty Co.*, 189 Ia. 678, 179 N. W. 203.
Boatwright v. *American Life Ins. Co.*, 191 Ia. 253, 180 N. W. 321.
Vol. 5 Joyce on Insurance, p. 6112.
Goodwin v. *Provident etc. Ass'n.*, 97 Iowa, 226.
Drews v. *Ins. Co.*, 79 N. J. L. 398, 75 Atl. 167, 168.
Royal Circle v. *Achterrath*, 204 Ill. 549, 68 N. E. 492, 63 L. R. A. 452.
Mutual Life Ins. Co. v. *New*, 125 La. 41, 51 So. 61, 27 L. N. S. 431.
McKendree v. *Ins. Co.*, (S. Car.) 99 S. E. 806.
Woodmen of the World v. *Gilliland*, (Okla.) 67 Pac. 485.

If the construction of language in an insurance policy is doubtful, the words, being those of the insurer, are to be taken most strongly against the company, and most favorably to the insured.

Grace v. *American Cent. Ins. Co.*, 109 U. S. 278, 27 L. Ed. 932, 934.
Travelers Ins. Co. v. *McConkey*, 127 U. S. 661, 32 L. Ed. 308.
Mouler v. *American Life Ins. Co.*, 111 U. S. 335, 28 L. Ed. 447.
Burkheiser v. *Mutual Acci. Ass'n.*, 61 Fed. 816, 26 L. R. A. 112.
Liverpool & L. G. Ins. Co. v. *McNeill*, 32 C. C. A. 180, 89 Fed. 131.
Canton Ins. Co. v. *Woodside*, 33 C. C. A. 68, 90 Fed. 301.

Imperial Fire Ins. Co. v. *Coos County,* 151 U S. 452, 38 L. Ed. 231.
McMasters v. *New York Life Ins. Co.,* 40 C. C. A. 141, 99 Fed. 856.
Thompson v. *Phenix Ins. Co.,* 136 U. S. 287, 34 L. Ed. 408.

The courts will not give a construction to an insurance policy which will make it deceptive and calculated to mislead the well informed and impeach the good faith and fair dealing of the company, but will give it a liberal interpretation in favor of the insured.

Phenix Ins. Co. v. *Slaughter,* 12 Wall. 404, 20 L. Ed. 444.

"The rule is that if policies of insurance contain inconsistent provisions or are so framed as to be fairly open to construction, that view will be adopted, if possible, which will sustain, rather than forfeit, the contract."

McMaster v. *N. Y. Life Ins. Co.,* 183 U. S. 25, 42; 46 L. Ed. 64, 73.
Thompson v. *Phenix Ins. Co.,* 136 U. S. 287, 34 L. Ed. 408.

IV.

The death of the insured within the contestable period does not arrest the running of the so-called short statute of limitations adopted by the parties. The insurer must nevertheless take some "affirmative action," either by bringing suit, or by making defense to a suit, within the stipulated time.

Black v. *Ross,* 110 Iowa 112, 113.
Malone v. *Averill,* 166 Iowa 78, 83.

Ackerman v. *Hilpert,* 108 Iowa 247.
New York Life Ins. Co. v. *Baker,* 83 Fed. 647, 27 C. C. A. 658.
Wright v. *Mutual Benefit Life Ass'n.,* 118 N. Y. 237, 6 L. R. A. 731, 733.
Ebner v. *Ohio State Life Ins. Co.,* 69 Ind. A. 32, 121 N. E. 315, 317.
Prudential Life Ins. Co. v. *Lear,* 31 App. D. C. 184.
Jefferson Standard Ins. Co. v. *Wilson,* (C. C. A.) 260 Fed. 593.
American Trust Co. v. *Life Ins. Co.,* 173 N. Car. 558, 92 S. E. 706.
Hardy v. *Phenix Mutual Life Ins. Co.,* 180 N. C. 180, 104 S. E. 166.
Monahan v. *Metropolitan L. Ins. Co.,* 283 Ill. 136, 119 N. E. 68, L. R. A. 1918 D. 1196.
Plotner v. *Northwestern Nat'l. L. Ins. Co.,* (N. D.), 183 N. W. 1000, 1004.
Ramsay v. *Old Colony L. Ins.,* 297 Ill. 592, 131 N. E. 108, 110.

V.

An insurer seeking to contest a policy on the ground of fraud must act with diligence upon discovering the fraud.

Ramsay v. *Old Colony Life Ins. Co.* 297 Ill. 592, 131 N. E. 108, 109.
Clement v. *New York Life Ins. Co.,* (Tenn.) 46 S. W. 561, 42 L. R. A. 247, 249.
Commercial Life Ins. Co. v. *McGinnis,* 50 Ind. A, 630, 97 N. E. 1018, 1019.

The insurance company must "contest" the policy by taking some affirmative action, either by making defense to an action brought to recover on the policy, or

by an action brought by it to cancel or rescind the contract.

Monahan v. *Metropolitan Life Ins. Co.,* 283 Ill. 136, 119 N. E. 68, L. R. A. 1918 D. 1196 note.

Jefferson Standard Life Ins. Co. v. *Wilson,* (C. C. A.), 260 Fed. 593.

Black on Rescission and Cancellation, Vol. 2, p. 1155.

Ebner v. *Ohio State Life Ins. Co.,* 69 Ind. A. 32, 121 N. E. 315, 317.

Mass. Benefit Life Ins. Co. v. *Robinson,* (Ga.) 30 S. E. 918, 42 L. R. A. 261.

Indiana National Life Ins. Co. v. *McGinnis,* 180 Ind. 9, 101 N. E. 289, 45 L. N. S. 192. 196.

Commercial Life Ins. Co. v. *McGinnis,* 50 Ind. A. 630, 97 N. E. 1018, 1019.

Wright v. *Mutual Ben. Life Ins. Co.,* 43 Hun. 61 (Quoted in *Mass. B. Life Ass'n.* v. *Robinson,* (Ga.) 42 L. R. A. 261, 269).

Duvall v. *National Life Ins. Co.,* 28 Idaho 356, 154 Pac. 632, L. R. A. 1917 E. 333, 339.

American Trust Co. v. *Life Ins. Co.,* 173 N. Car. 558, 92 S. E. 706.

Murray v. *State Mutual Life Ins. Co.,* (R. I.) 48 Atl. 800, 53 L. R. A. 742, 743.

Mutual Life Ins. Co. v. *Buford,* (Okla.) 160 Pac. 928.

Moran v. *Moran,* 144 Iowa 451.

Ramsay v. *Old Colony Life Ins. Co.,* 297 Ill. 592, 131 N. E. 108.

Reagan v. *Union Mutual Life Ins. Co.,* 189 Mass. 555, 76 N. E. 217, 2 L. N. S. 821.

Teeter v. *United, etc, Ins. Ass'n.,* 159 N. Y. 411, 54 N. E. 72.

An insurance company is not entitled to claim that the death of the insured within the contestable period stops the running of that period, in the absence of a showing of "special circumstances" which would prevent it from contesting its liability on the policy in an action at law.

Jefferson Standard Life Ins. Co. v. *Wilson,* (C. C. A.) 260 Fed. 593.

Greisa v. *Mutual Life Ins. Co.,* (C. C. A.) 169 Fed. 509, 513.

Riggs v. *Union Life Ins. Co.,* (C. C. A.) 129 Fed. 207.

Cable v. *United States Life Ins. Co.,* 191 U. S. 288, 48 L. Ed. 188.

Monahan v. *Metropolitan Life Ins. Co.,* 283 Ill. 136, 119 N. E. 68, L. R. A. 1918 D 1196, 1198.

Phoenix Mutual Life Ins. Co. v. *Bailey.* 13 Wall. 616, 20 L. ed. 501.

Ramsey v. *Old Colony Ins. Co.,* 297 Ill. 592, 131 N. E. 108, 111.

Bankers Res. L. Co. v. *Omberson,* 123 Minn. 285, 143 N. W. 735.

VI.

It is not the law in Iowa, as held by the Circuit Court of Appeals on the first appeal, that "the intention to deceive the insurer is necessarily implied as the natural consequence" of the act of misstating the fact regarding consulting physicians.

Ley v. *Metropolitan Life Ins. Co.,* 120 Iowa 203, 210.

Lakka v. *Modern Brotherhood,* 163 Iowa 159, 170.

Murphy v. *National etc. Ass'n.*, 179 Iowa 213, 222.

Smith v. *Packard Co.*, 152 Iowa 1, 6.

New York Life Ins. Co. v. *Wertheimer*, 272 Fed. 730.

It is the rule of the federal courts that they will follow the rules adopted by the courts of last resort of the state where the cause of action arose, especially in insurance cases.

John Hancock Life Ins. Co. v. *Warren*, 181 U. S. 73, 45 L. ed. 755.

New York Life Ins. Co. v. *Cravens*, 178 U. S. 389, 44 L. ed. 1116.

Equitable Life Assur. Soc. v. *Brown*, 213 U. S. 25, 53 L. ed. 682.

Orient Ins. Co. v. *Daggs*, 172 U. S. 577, 43 L. ed. 552.

"The state where the application is made and where the premium is paid and the policy delivered is that where the contract was entered into."

Mutual Life Ins. Co. v. *Cohen*, 179 U. S. 262, 45 L. ed. 181.

New York Life Ins. Co. v. *Russell*, (C. C. A.) 77 Fed. 94.

Albro v. *Manhattan Life Ins. Co.*, (C. C. A.) 119 Fed. 629.

Equitable Life Ins. Co. v. *Winning*, (C. C. A.) 58 Fed. 541.

Fletcher v. *New York Life Ins. Co.*, 13 Fed. 526.

It is only where the evidence at the second trial is the same as that on the first trial that the rule of "The Law of the Case" can be successfully invoked.

U. S. Annuity etc. Co. v. *Peak*, 129 Ark. 43, 195 S. W. 392, 1 A. L. R. 1259, 1270, note.

Messinger v. *Anderson*, 225 U. S. 436, 56 L. ed. 1152.

After a cause has been remanded for new trial the pleadings may be amended so as to present new issues.

21 R. C. L. p. 590.

Marine Ins. Co. v. *Hodgson*, 6 Cranch 206, 3 L. ed. 200.

Tremaine v. *Hitchcock*, 23 Wall, 518, 23 L. ed. 97.

Adams County v. *Burlington etc. Co.*, 44 Iowa 335.

ARGUMENT.

I.

Purpose and validity of "incontestable" clauses.

(1) The incontestable clause in an insurance policy giving the insurance company a reasonable time within which to investigate and discover fraud, if any, is a valid policy provision, and is not subject to the objection that it is against public policy. It has the effect of a short statute of limitations, but it is in reality an express waiver, after a fixed period, of all defenses which might be set up by the insurance company as grounds for its refusal to pay the amount of the policy, save those defenses which are expressly excepted.

The purpose and object of the incontestable clause is clearly stated in the note to *Duvall* v. *National Life Insurance Company,* 28 Idaho 356, 154 Pac. 632, L. R. A. 1917 E 333, 339 as follows:

> "A distinction is recognized between the clauses considered in the preceding subdivision providing for incontestability from date, and those which provide that the policy shall be incontestable after a certain period. The decisions are in harmony in holding that clauses of the latter character are, where the period specified gives a reasonable time for investigation, valid, and after the expiration of the designated period effectual *to bar the insurer from asserting all defenses not expressly excepted, including fraud on the part of the insured,* the reasoning of the courts being that such provisions merely provide for a short period of

limitations, and where this period is of sufficient length to enable the insurer to discover fraud it is not against public policy."

The author of this note cites in support of this statement of the law numerous cases, including the following:

Arnold v. *Equitable Life Ins. Co.*, 228 Fed. 157.
Mutual Reserve Fund Life Ass'n. v. *Austin*, (C. C. A.) 142 Fed. 398, 6 L. N. S. 1064.
Great Western Life Ins. Co. v. *Snavely*, (C. C. A.) 206 Fed. 20, 46 L. N. S. 1056.
Wright v. *Mutual Benefit Ins. Co.*, 118 N. Y. 237, 6 L. R. A. 731.
Teeter v. *United States Life Ins. Co.*, 159 N. Y. 411, 54 N. E. 72.
Welch v. *Union Cent. Life Ins. Co.*, 108 Iowa 224.

With reference to the nature and effect of this provision, the court says in the case of *Mutual Reserve Fund Life Ass'n.* v. *Austin*, (C. C. A.) 142 Fed. 398, 6 L. N. S. 1064, referring to a three-year contestable period, as follows:

"Continuance of life for three years removes certain risks and affords a reasonable period for the detection of fraud. It has become quite customary for insurance companies to waive warranties and conditions after two or three years. In construing this incontestable clause, we must not lose sight of the fact that it relates, not to the risk at the date of the policy, but at a period of three years later, and to a risk that is different in character."

In *Wright* v. *Mutual Benefit Life Ass'n.*, 118 N. Y. 237, 6 L. R. A. 731, 733, the court says with reference to the effect of such a clause as to the defense of fraud, as follows:

> "It is not a stipulation absolute to waive all defenses, and to 'condone fraud.' On the contrary, it recognizes fraud and all other defenses, but it provides ample time and opportunity within which they may be, but beyond which they may not be, established. It is in the nature of, and serves a similar purpose, as a statute of limitation and repose, the wisdom of which is apparent to all reasonable minds. It is exemplified in the statute giving a certain period after the discovery of a fraud in which to apply for redress on account of it, and in the law requiring prompt application after its discovery, if one would be relieved from a contract infected with fraud. *The parties to a contract may provide for a shorter limitation thereon than that fixed by law;* and such an agreement is in accord with the policy of statutes of that character."

The Supreme Court of Iowa describes the nature of the incontestable clause in *Welch* v. *Union Central Life Ins. Co.*, 108 Iowa, 224, 230 as follows:

> *"Such provisions are held to be in the nature of a statute of limitation or repose and that, as the parties may stipulate as to the time when action may be brought, so they may stipulate as to the time within which it might assert the fraud as against the contract."*

In *Murray* v. *State Life Insurance Co.*, (R. I.) 48 Am. 800, 53 L. R. A. 742, 743 it is said:

> "The practical, and evidently the intended, effect of the stipulation in question, was to create a

short statute of limitations in favor of the insured, within which limited period the *insurer must, if ever, test the validity of the policy.* It has repeatedly been held that an agreement limiting the time within which an action may be brought upon a policy of insurance is not against public policy, and may be enforced, though less than the usual time imposed by law has been fixed. * * * To hold the company bound by such an undertaking is not to violate any rule of public policy, but is simply to compel it to fulfill its plain and deliberately assumed obligations." * * *

(2) *The incontestable clause was adopted by the insurance companies, ostensibly for the benefit of the insured, but in reality for the benefit of the companies themselves. It has the effect of allaying the apprehensions of the insured, and thus enable the companies to increase their business.*

"The object of the clause is plain and laudable, to create an absolute assurance of the benefit, as free as may be from any dispute of fact except the fact of death, and as soon as it reasonably can be done."

Mutual Life Ins. Co. v. *Johnson,* 254 U. S. 96, 65 L. ed. 155.

"To free the mind of the applicant for life insurance from apprehension raised by these numerous conditions and warranties, and to assure him that his beneficiary shall have a clear and incontestable right, is the ostensible purpose of the incontestable clause. A construction which reads into it as permanent provisions the very conditions which apparently it was designed to terminate

makes it not only inoperative, but exceedingly deceptive."

Mutual Reserve Fund Life Ass'n. v. *Austin,* (C. C. A.) 142 Fed. 398, 402, 6 L. N. S. 1064.

"This clause, which has been generally adopted by the insurance companies, is not primarily for the benefit of the insured, but for the benefit of the insurance company itself. * * * The companies adopted the incontestable clause for the purpose of increasing their business."

American Trust Co. v. *Life Ins. Co.,* 173 (N. Car.) 558, 92 S. E. 706.

"The incontestable clause of the policy was evidently carefully framed by the company itself, and expressly framed to induce people to insure, and reserved the right to contest a recovery on the policy on only one ground, aside from the military or naval one, and that was a failure to pay premiums."

Duvall v. *National Life Ins. Co.,* 28 (Idaho) 356, 154 Pac. 632, L. R. A. 1917 E. 333.

"The acceptance by the insured of this clause makes the contract as binding as would a statute on the subject. Statute and contract would be equally binding. The company, in order to promote its business and increase its popularity as an insurer, inserted this clause in the policy, and offers it as an inducement to take insurance. It uses it to the best advantage. The parties to a contract can adopt a prescriptive term."

Mutual Life Ins. Co. v. *New,* 125 La. 41, 51 So. 61, 27 L. N. S. 431, 434.

Such is the view of the courts with reference to what counsel for petitioner refer to as "the self-imposed limitation on its right to contest" its own contract.

(3) Counsel for petitioner contend in substance that since there was *fraud in the inception of the policy,* and since fraud is established by proof and by this court's decree, which is both contrary to the fact and the law, so far as this case is concerned, because a new trial has been granted and the case stands as if no former trial has been had and as if no opinion had been written, the *policy was void and the incontestable clause never had any force* or effect to bind the insurance company.

Counsel cite no authorities in support of this contention. The reason why they cite none is because the authorities are all against them on the proposition.

> "It is not true that because a policy is procured by misrepresentation of material facts it is therefore to be treated, in the sense of the law, as utterly void *ab initio.* It is merely voidable, and it may be voided by the underwriters upon due proof of the facts; but *until so avoided it must be treated for all practical purposes as a subsisting policy."*
>
> *Carpenter* v. *Providence Ins. Co.*, 16 Pet. 495, 509, 10 L. Ed. 1044, 1050.
>
> See *Mutual Res. Fund Life Ass'n.* v. *Austin* (C. C. A.), 142 Fed. 398, 6 L. N. S. 1064.
>
> *Mohr* v. *Prudential Life etc. Co.*, 32 (R. I.) 177, 78 Atl. 554.
>
> *Commercial Ins. Co.* v. *McGinnis,* 50 Ind. A. 630, 97 N. E. 1018.

> "The contention of the appellee is that as the contract of insurance was obtained through fraud, it was void *ab initio,* and therefore there never was a legal contract to which the limitation agreed upon can be applied. * * * We are of the opinion that the incontestability clause in this contract

should be interpreted to include all defenses other than non-payment of dues."

Drews v. *Ins. Co.*, 79 N. J. L. 398, 75 Atl. 167, 168.

In *Arnold* v. *Equitable Life Ins. Co.*, 228 Fed. 157, where the clause was, "This policy becomes incontestable * * * one year from its date of issue," is is said:

> "Does the 'incontestable clause' in this policy prevent the defendant from making the partial defense pleaded herein? These clauses have been uniformly upheld, and uniformly construed against the insurer. It has been seriously contended that such clauses should not be efficient as against actual fraud; but, even in the most gross frauds, it is now well settled that the incontestable clause is effectual."

In *New York Life Ins. Co.* v. *Baker,* (C. C. A.) 83 Fed. 649, 27 C. C. A. 658, where the insured died within the year, and it was contended that the policy never took effect as a contract because statements to the medical examiner were false, it was held that their falsity merely rendered the policy voidable at the election of the insurer, as is provided that it should be incontestable after one year, and contained no stipulation that a false statement should render it void. Therefore the company could waive the breach of warranty, or could estop itself by its conduct from taking advantage thereof.

In *Mutual Reserve Fund Life Association* v. *Austin* (C. C. A.), 142 Fed. 398, 6 L. N. S. 1064, it is held that a provision in an insurance policy that, if the policy shall have been in continuous force for three years, it

shall thereafter be incontestable, cannot be held to be inapplicable to a policy delivered when the insured was not in good health, on the theory that because the policy provided that it should not take effect until delivered while the insured was in good health, it never was in force.

II.

When the Contestable Period Begins and Ends.

The contestable period should be computed from the date the policy bears, not from the uncertain date of delivery or from any other uncertain date, in the absence of an express agreement, and the two-year period ends two years from the former date. This, in brief, was the holding of the Circuit Court of Appeals in this case and that holding appears to be fully justified by the wording of the policy. The material parts of the policy are the following, the italics being ours:

"THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, in consideration of the *annual premium* of one thousand and sixty-nine and 75/100 dollars the receipt of which is hereby acknowledged, and of the payment of a like amount upon each *23rd day of August hereafter* until the death of the insured, promises to pay upon receipt of due proof of the death of Rudolph Hurni * * * the amount of twenty-five thousand dollars, * * * to Hurni Packing Company of Sioux City, Iowa, * * *

"All premiums are payable in advance at said home office, or to any agent of the company upon delivery on or before *the date due* of a receipt signed by the president * * * and countersigned by said agent * * *

"SUICIDE. The company shall not be liable hereunder in the event of the insured's death by his own act, whether sane or insane, during the period of one year after *the date of issue* of this policy, as set forth in the provisions of the application endorsed hereon, or attached hereto."

"INCONTESTABILITY: This policy shall be incontestable except for non-payment of premiums provided two years shall have elapsed from its date of issue. * * *

"IN WITNESS WHEREOF *the company has caused this policy to be executed this 23rd day of August,* 1915" (Trans. pp. 2-4, 84-86).

The APPLICATION, which is expressly made a part of the policy, contains the following:

"Application of Rudolph Hurni for insurance.

"Date of Policy, August 23, 1915; Age 47. This application is made to the Mutual Life Insurance Company of New York" * * *

"I agree that any policy the company may issue upon this application shall contain the following clause:

" 'If the insured shall engage in such military or naval service * * * within *the first policy year,* and shall die within one year of the date of the beginning of such service * * * the Company's liability here-

under shall be limited to one-fifth of the face of the policy' * * *

"During the period of one year following *the date of issue* of the policy, for which application is made, I will not engage in any of the following extra hazardous occupations. * * * It is understood and agreed that the risk of death will not be covered by the policy if such death occurs by my own act, whether sane or insane during the period of one year next following *the date of issue.* * * *" (Trans. 4-6).

It will be noted that the language used as above quoted is such as would lead the average policy holder to believe that the period of his obligations began on the date of the execution of the intrument, as it recites, to-wit: "August 23, 1915," and that for all practical purposes no other date became a part of the contract. Each twenty-third of August *hereafter* means *after the date the policy bears,* not after some uncertain date.

It will also be observed that the words "*The* date of issue" appear three times in the policy and application. The "Incontestability" clause contains the words "*its* date of issue," instead of "*the* date of issue." If there is any significance in using the possessive pronoun in place of the definite article, "the," the possessive would point to the date which the policy bears, as its date of execution, and thus fix the beginning of the contestable period as August 23, 1915.

It should be further noted that the policy contains the words, "a like amount upon each 23rd day of August *hereafter,*" in referring to the annual premium, and the

further statement that *"the company* has caused these presents to be executed this 23rd day of August, 1915," and in addition the terms of the policy require the applicant to agree that he will not engage in military or naval service within "the first policy year." Now *the first premium year and the "first policy year" both commenced August* 23, 1915, *and ended August* 23, 1916. *That being true, the second policy year ended August* 23, 1917, *or before the petitioner determined at its New York office that it would not pay the insurance.* In the absence of express language to the contrary, the beginning of the measurement of time under the policy should be uniform throughout. The contestability period should likewise commence with the date, August 23, 1915.

It is a universal custom, prompted by different considerations, not only to ante-date but to post-date contracts. Giving a contract an arbitrary date does not affect its validity in any respect, and the arbitrary date fixed in the contract is the date from which all periods of time provided for in the contract are computed, unless the language clearly indicates the contrary. How simple and easy it would have been, if the Insurance Company wished to preserve to itself the full two year period from the date of delivery, to have so provided in its contract. The fact that it did not so provide is the very best evidence that it did not intend that the two year contestable period should begin with the delivery. The average business man and average policy-holder would instantly say, in looking at this contract, that the period of con-

putation of time not only with reference to the insured but with reference to the insurer, begins with the date the contract was executed, as shown by the instrument, to-wit, August 23, 1915.

(1) *The insurance company can adopt any reasonable time as its contestable period.*

It can by contract provide that the period shall commence with the date which the policy bears, or the date of medical examination, or the date of the actual delivery of the policy.

The date of the delivery of the policy is, as heretofore stated impractical, because it is lacking in uniformity and certainty. If the policy provided for annual premiums it might be somewhat difficult to have a uniformly certain date to use as a basis of premium payment. The company exists by means of its premiums and not only that, but the insured must have a date about which there can be no doubt or misunderstanding. Moreover, to make an insurance policy operative from its date of delivery, the Company having already fixed the date of premium payment at the date the policy bears would create an incentive on the part of the insurance company to delay the date of delivery as long as possible and thus shorten the risk period. *For this court to hold that the premium obligations should mature on one date and the company obligations on a different date would be adopting a rule which would lead to uncertainty and confusion, and a rule which would benefit only the Insurance Company.* The same objections would lie to the adoption of the date of the medical examination. The date the

policy bears is a certain one. The insured and the insurer both have a record of that date, and by the issue and acceptance of the policy they mutually adopt that date as the date from which all premium payments, as well as the other conditions of the policy shall be computed. The policy provides that:

> "In consideration of the annual premium of One Thousand Sixty Nine Hundred and seventy-five hundredths dollars, * * * and the payment of a like amount upon each 23rd day of August *hereafter* till the death of the insured," etc. (Trans. p. 3).

August 23rd is used for determining the date of premium payments, and there is no logical reason why the date adopted for premium payments thus fixing the obligation of the insured, should not fix the date when the contestable period shall begin, and the date from which to compute the period in which investigation may be made by the company to discover fraud, if any, on the part of the insured.

If the date which the policy bears, and the date upon which it appears to have been executed is the date of issue then the Insurance Company had two years less the predating period, in which to make the contest. Certainly *it could predate its contestable period as easily as it could predate its policy in order to make the premium payments mature earlier.* If it got the benefit of the latter, why should it not be held to surrender the former, especially in view of the fact, that an Insurance Company may fix any reasonable period in which to contest

a policy and certainly no one will contend that one year and forty-nine weeks was an unreasonably short time.

Counsel for the Insurance Company want the obligations of the insured to commence on August 23, the date of the policy, and they want the company's obligations to commence September 13th, the uncertain date of delivery. By reason of the predating of the policy, a consideration extended by the Company to the insured as an inducement the latter was obliged to pay his second premium at the end of forty-nine weeks instead of fifty-two. Meanwhile, the company got a premium for fifty-two weeks, but in fact insured Mr. Hurni for only forty-nine weeks because he had already lived three weeks of the period for which insurance was collected. For this period the insurance company sustained no risk whatsoever. It was glad to accept the benefits but when it comes to measuring its obligations it wants to do so in accordance with an entirely different rule.

(2) *The contestable period of the Hurni policy began August* 23, 1915.

The authorities without exception sustain counsel for respondent, as clearly appears from the following:

> "The period fixed by law being intended for the benefit of the parties interested in the contract, and for their protection, it is competent for them to stipulate that the time which the law gives them to act shall be shortened, on the one hand, or lengthened on the other."
>
> *Mass Benefit Life Ins. Co.* v. *Robinson*, (Ga.) 30 S. E. 918, 42 L. R. A. 261, 269.

> "A provision in a policy for nonreliability in the event of suicide within one year 'after the issuance'

of the policy means a year from its date where the premiums are paid from its date, and the other parts of the policy show that the day of its date was considered the day of its issuance."

14 R. C. L. 1233, citing

Anderson v. *Mutual Life Ins. Co.*, 164 Cal. 712, 130 Pac. 726.

Harrington v. *Mutual Life Ins. Co.*, 21 N. D. 447, 131 N. W. 246, 34 L. N. S. 373.

"Under a provision that the policy shall be incontestable after a specified period from date, the time runs from the date of the policy, and not from the date of its subsequent delivery, and the fact that the insured was not in good health, as required by the policy, when it was delivered, is immaterial."

14 R. C. L. 1201.

"The clause in the last certificate relating to suicide invalidates it if suicide is committed 'within three years from the date of this certificate.' This should be construed to have reference to the time specified in the instrument. * * * The date is the important part of the instrument, and, when coupled with another provision relating to when something is to be done, should not be disregarded. Especially is this true where the instrument is executed as a substitute for another and *the date* of the original *designedly inserted.* As said in *Bement* v. *Trenton etc. Mf'g. Co.*, 32 N. J. L. 513: 'the primary signification of the word "date" is not time in the abstract, nor time taken absolutely, but as its derivation plainly indicates, time given or specified, time in some way ascertained or fixed; this is the sense in which the word is commonly used. *When we speak of the date of the deed, we do not mean the time when it was actually executed, but the time of its execution, as given or stated in the deed itself. The date of an item or of a charge in a book account is not necessarily the time when the article charged*

was in fact furnished, but simply the time given or set down in the account, in connection with the charge.' Moreover, *if the instrument is open to different constructions, that most favorable to the insured should be adopted.* Death having occurred more than three years subsequent to the date of the certificate, that it was suicidal did not constitute a defense to the second certificate."

Wood v. *American Yeomen*, 148 Iowa 400, 404.

"In order to avoid the effect of the one-year clause after which the policy could not be contested, the company alleged, and now contends, that while the policy bears date June 8, 1914, yet, as a matter of fact, the policy was not delivered, or the first premium paid, until June 13, 1914; and that Milam having died on June 8, 1915, he died within a year 'from the date' of the policy.

"We see no merit in this contention. While it is true that insurance companies frequently, and we believe usually, do not deliver a policy upon the day of its date, nevertheless *all the provisions of the policy as to payments of future premiums, its maturity, if it runs for a term, and similar provisions are calculated from the day of its date.* Of course, the insured can contract for a policy to be dated on any date after the date of his application, but as a matter of routine business, policies are usually dated either according to the date of the application, or of its execution, and are subsequently delivered without any question being made upon that subject. But the rights of the parties to the contract are determined by the date, and all future premiums are to be paid accordingly."

Meridian Life Ins. Co. v. *Milam*, 172 Ky. 75, 188 S. W. 879, L. R. A. 1917 B 103.

"The insured paid the appellant for carrying the said insurance from September 30, 1903, and the policy provided if the policy should remain in con-

tinuous force, 'two years from the date hereof'—that is, from September 30, 1903—it should be incontestable except for nonpayment of premium. We do not see, therefore why the date from which the two years should commence to run should not be held to be September 30, 1903. If, however, the two clauses found in the policy—that is, the clause which provided if the policy should remain in force 'two years from the date hereof,' and the clause which provided the policy should not become binding on the company until the first payment should have been made and the policy delivered—are to conflict with each other and render the time uncertain from which the two years in which the policy might be contested should commence to run, we think the first clause—that is, that the policy should be incontestable if it remained in continuous force after two years from the date thereof—*should be held to control, as that construction would be favorable to the insured*, as the rule is that the language of an insurance policy, when uncertain or ambiguous, is always to be construed in favor of the insured and more strongly against the insurance company * * * Our conclusion is that the policy became incontestable two years after September 30, 1903, if it continually remained in force from that date for two years."

Monahan v. *Fidelity Mut. Life Ins. Co.*, 242 Ill. 488, 90 N. E. 213, 214.

"It is perfectly competent for the parties to agree that a policy shall be antedated and, when this is done, the policy takes effect by relation from the date agreed upon. * * * In the absence of evidence to the contrary, a policy will be presumed to take effect upon its date. * * * The policy here sued upon, therefore, must be construed as effecting an insurance upon the life of Anderson for a period beginning May 22, 1908. The day upon which, by the agreement of the parties, the risk attached, may

reasonably be taken to be the day which was meant to be designated, in the clause under consideration, as that of the 'issuance' of the policy. *The company inserted in the policy the various provisions above referred to, securing to itself various benefits which would naturally pertain to an insurance issued on the twenty-second day of May, rather than one issued at a later time. It thus became entitled to an earlier payment of premiums; it also received payment for insuring the life of Anderson during a period which had already elapsed when the policy was actually signed and delivered. The policy, then, having been written so as to take effect for its main purpose and its principal incidents, as of the twenty-second day of May, a clause which speaks of the time of 'issuance' of the policy is fairly to be taken to refer to that date."*

Anderson v. *Mutual Life Ins. Co.*, 164 Cal. 712; 130 Pac. 726, Ann. Cas. 1914 B. 903, 904.

"The first proposition presented to us raises the question of the date of the policy which is stated 'to be executed this 9th day of May, 1908.' *The general rule is that a policy of insurance, if delivered, takes effect from its date, unless it be otherwise stated.* See May, Ins. 2d edition Sec. 400. *If it be alleged that the contract takes effect at some other date, then evidence of this contrary intent must be shown.* Of course, the burden of introducing such evidence would be upon him who alleges it. * * * To get this benefit, the policy was dated back some nine days, which would be as of three or four days less than forty-two years and six months old. The company got the benefit of this, for it is a certainty of life on which they assumed no risk, and for which they were paid. Clearly, it was the intention of the parties to make the date as of the 9th of May, 1908. The contract, therefore, was made as of May 9, 1908.

"Appellant says the fact that the company agreed to the dating back does not estop them from raising this question, because the dating back was but for one purpose, and that was the fixing of the date of payment of the premiums. We cannot agree with this in its entirety. The purpose for the dating back of the contract may have been to get a little less rate of premium; but the fact stands that *the contract itself was dated back; that is, the whole contract, and not the portion alone dealing with the insurance rate.* If the contention of the appellant were correct, the purpose could have been obtained by simply making the contract as of its correct date, but lowering the rate of insurance. Instead of doing this the company maintained its uniform rate, but takes a retrospective risk. * * * The company took premiums for that period, fixed the date of the payment of the premiums as of that date, and made no provision in the contract limiting the dating back solely to the payment of premiums. It is well settled that where there is any uncertainty in the terms of an insurance policy, that the policy will be construed most favorably for the insured, as the language used in the policy is the language of the insuring company. The company prepares the blanks, dictates the terms, and it would be idle to say that the insured need not accept the terms, unless he sees fit."

Harrington v. *Mutual Life Ins. Co.*, 21 N. D. 447, 131 N. W. 246, 34 L. N. S. 373, 377, 378.

On this point the opinion of the Circuit Court of Appeals in this case (280 Fed. 22) states the law clearly as follows:

"In the absence of any qualifying language the date of the policy is always taken to mean the date of issue. * * * We must take the date agreed

upon as the date of the policy for all purposes affected thereby. It is a matter of common knowledge that no policy bears a date identical with that of delivery, or of conditions and happenings governing the time when it became effective. These incidents are rarely regarded as conditioning the date of the issue or execution as evidenced by the date appearing upon the face of the policy. If it had been the purpose of the insurer to depart from the customary rule of construction and interpretation in this respect, it could, and would, have adopted language expressive of that purpose. Instead of 'date of issue' it would naturally have provided that the two years should elapse 'from date of delivery' or 'from the date the policy becomes effective,' or from the 'time' instead of 'date' of issue. It may be further noted that the language used is *its* date of issue: thereby referring more obviously to the date borne by the policy itself."

(3) *Counsel for petitioner would have the court give a different meaning to the words "date of issue."*

They contend that emphasis should be placed on the word "issue" and that "to issue" means "to put forth," to "emit," "to give effect to," "to deliver for use," "delivery." They cite Webster's Dictionary. A good dictionary will give synonyms covering the entire range of use, but the meaning of "issue" in relation to insurance policies may best be determined by the language of the courts in cases in point. The language of those decisions which bear on the question make it very clear that the phrase, "to issue," in an insurance policy is not synonymous with "to deliver."

In *Kansas Mutual Life Ins. Co.* v. *Coalson*, 22 Tex. Civ. App. 64, 54 S. W. 388, 392, it became necessary to

construe the meaning of "issued" in a policy of life insurance. The court said:

"Without entering into a discussion of the distinctions sought to be drawn by counsel as to the technical meaning of the word 'issue' and its meaning as ordinarily used we will dispose of the question *by saying that it is undoubtedly used both by the laity and profession as not including within its meaning a technical delivery,* and the court was correct in holding that the facts proved did not constitute a breach of warranty."

In the case of *Stringham* v. *Mutual Life Ins. Co.,* 44 Ore. 447, 75 Pac. 822, the policy provided that it should take effect when signed by the secretary of the company "and issued." The insured died after the policy was executed and before it was actually delivered to him. The defense was based upon the theory that the policy had not been issued because it had not been delivered. The court said:

> *"We conclude therefore that the term 'issued' was used as indicative of the completed signing up and execution of the instrument, making it ready for delivery.* This construction is suitable and reasonable, although it must be admitted that the term employed is not without ambiguity. But if it may be said that it is susceptible of two constructions, and there is a doubt as to its true meaning, then it should be construed as we have construed it, most strongly against the insurer. Kerr Ins., Par. 65; Berryman 3 Digest Law Insurance, Par. 3012."

The authority of these cases is founded in reason. The policy is actually issued by the company at its home office. The home office absolutely controls the acceptance

or non-acceptance of the risk. Execution of the instrument marks the acceptance by the company of the risk, and in the absence of a stipulation to the contrary binds the company. The act of the home office marks the "issuance" of the policy. Execution and issuance are synonymous. That the defendant in this case recognizes the truth of this assertion is clearly shown by the fact that it inserts in its form of application the express provision, which the applicant is compelled to sign, that "the proposed policy shall not take effect * * * *unless also* the policy shall have been *delivered to and received by me* during my continuance in good health." The company has clearly differentiated between *issuing* and *delivering*, and when it means *delivery*, it says so in no uncertain terms. If the company had meant the incontestability period as well as the period of risk to start running at the time of delivery instead of the date of the policy what would have been more simple and natural than that it should say so in the same clear and unmistakable language. In the absence of such a stipulation the company must be bound by the conventional date of issue as it appears in the testimonium of the policy, even as the insured is bound by that date in the payment of the premiums. The Circuit Court of Appeals was therefore correct in its conclusion in saying that: "By agreement the conventional *date of execution, and hence the issue*, was the 23rd day of August, 1915. In absence of any qualifying language, the date of a policy is always taken to mean the date of its issue; and the language of an insurance policy when uncertain and ambiguous has al-

ways been construed in favor of the insured and more strongly against the insurance company. So the courts have uniformly held."

Furthermore "date" means time given to or specified in a document. Such is its customary meaning. Such is the meaning one would expect from the derivation of the word from the Latin "datum." *"Its date"* can mean but one thing: That date which is fixed by it and specified in it as its date of execution. Since, in the language of insurance policies, issuance and execution are synonymous, "its date of issue" is merely a different way of expressing "its date of execution" which in the Hurni policy is stated over the signature of the president and secretary to be "August 23, 1915."

Even if "issue" meant "delivery for use" as the petitioner insists, still "its date of issue" can mean nothing other than the date set forth in the policy. "Its date" has a definite and unmistakable meaning when the derivation of the word is borne in mind, namely, the time given to or specified in the policy. Regardless of the meaning ascribed to the word "issue" the parties to the policy were competent to fix any date they chose as the agreed "date of issue." The date which they agreed upon and which they gave to and specified in the policy as its date of issue—the only date in the policy—is August 23rd, 1915. "Its date of issue" can mean no other date.

(5) *Analogous cases support a like conclusion.*

In cases of bond and note issues, as in case of insurance policies, it is impracticable that the date of de-

livery be the date appearing in the bonds and notes. In *Yessler* v. *City of Seattle*, 1, Wash. 308, 25 Pac. 1014, the Washington Supreme Court considered such a situation. The statute required that certain bonds bear their "date of issue." The bonds were not delivered until some time after their date. The question arose as to whether or not they should bear interest during the interval. The court said:

> "In financial parlance the term 'issue' seems to have two phases of meaning. *'Date of issue' when applied to bonds, notes, etc., of a series usually means the arbitrary date fixed at the beginning of the term for which they run,* without reference to the precise time when convenience or the state of the market may permit of their sale or delivery, and we see no reason why the act of March 26, 1890, should not have that interpretation. When the bonds are delivered to the purchaser, they will be 'issued' *to him* which is the other meaning of the term."

In that case the court recognized the possibility of construing the "date of issue" to mean "the date of issue *to him*," namely, to the purchaser, but it considered such a construction of no merit as compared with the one which it adopted, even though the construction adopted resulted in payment of interest on bonds not "yet delivered for use" or "put into circulation." This case is frequently cited and quoted with approval.

A like question arose in *State* v. *Blease*, 95 S. C. 403, 79 S. E. 247 at 256. There the court said:

> "The petitioners' next contention is that though consols issued under the act of 1892 are all

dated Jan. 1, 1893, they were not actually issued until later dates, and as the act reserves to the state the right to redeem at any time after 20 years from 'the date of issue' the commission has no right to call and redeem until after 20 years from the dates when they were actually issued. The phrase 'date of issue' means the dates which the bonds and stocks bear and not the dates when they were actually issued in the sense of being signed and delivered and put into circulation."

Quotations from authorities and precedents are the following:

"The date of a deed does not mean the time when it was actually executed, but the time of its execution, as given or stated in the deed itself."

17 C. J. 1170.

Bement v. *Trenton etc. Company,* 32 N. J. L. 513, 515.

"A provision in a policy for non-liability in the event of suicide within one year 'after issuance' of the policy means a year after its date, when premiums are paid from its date, and other parts of the policy show that the day of its date was considered the day of its issuance."

14 R. C. L. 1233.

Anderson v. *New York Mutual Life Ins. Co.,* 164 Cal. 712, 130 Pac. 726.

Ann. Cs. 1914 B 903.

Harrington v. *Mutual Life Ins. Co.,* 21 N. D. 447, 131 N. W. 246, 34 L. N. S. 373.

"It quite satisfactorily appears to us that the policy issued by the defendant must be considered as commencing on the 18th, the day of its date. It was in fact issued on that date, and the premiums covered the time intervening between that date and the date of its delivery on the 22nd. The defendant after having collected the premium, and

delivering the policy bearing date the 18th, cannot be heard to deny that the policy did not operate till its delivery. If the policy did not bind the defendant until the 22nd, then has the defendant received premiums for the time intervening before that date, and the 18th which it has not earned. But this cannot be permitted to claim."

Hubbard v. *The Hartford Fire Ins. Co.*, 33 Ia. 325, 327.

"The general rule is that a policy, if delivered, takes effect from its date, unless it be otherwise stated, or unless there is evidence of a contrary intent. If the premium be paid, and the policy be not delivered till afterwards, the policy takes effect by relation as of its date, even though a loss intervenes. May Ins. 400; *Ruse* v. *Mutual Ben. L. Ins. Co.*, 23 N. Y. 516; *Whitaker* v. *Farmers Union Ins. Co.*, 29 Barb. 312; *Lightbody* v. *North American Ins. Co.*, 23 Wend. 18; *Davenport* v. *Peoria Marine & Fire Ins. Co.*, 17 Iowa, 276."

Union Insurance Co. v. *American Fire Insurance Co.*, (Cal.) 40 Pac. 431, 28 L. R. A. 692, 693.

"Whether a risk be commenced when the contract for insurance is made, or only when the policy issues, must depend on the terms of the contract. Where, as in the present case, there is an express contract to take the risk from a past day, there is no room for any understanding that it is not to commence until a future day. Such an understanding would be directly repugnant to the express terms of the contract."

Commercial Mutual Marine Co. v. *Union Mutual Ins. Co.*, 19 How. 319, 15 L. ed. 636, 638.

III.

The "Incontestable" clause should be construed liberally in favor of the insured.

If there is any question as to the construction to be placed upon the words "its date of issue" as used in the incontestable clause, those words should be construed to refer to the date of the instrument rather than to the date of the delivery, or any other, for the reason that under the uniform holdings of the courts the policy must be "construed most strongly against the insurer and liberally in favor of the insured."

> "There is, in our opinion, no room for a different interpretation. If the construction were doubtful, then the case would be one for the application of the familiar rule that the words of an instrument are to be taken most strongly against the party employing them and, therefore, in cases like this, most favorably to the insured. The words are those of the company. If its purpose was to make notice to the person procuring the insurance of the termination of the policy, equivalent to notice to the insured, a form of expression should have been adopted which would clearly convey that idea, and thus prevent either party from being caught or misled."
>
> *Grace* v. *American Central Insurance Co.*, 109 U. S. 278, 27 L. Ed. 932, 934.

"It is further to be observed that if the language used in this policy or certificate can fairly be said to admit of two interpretations, and to be of doubtful construction, the court shall construe the provisions of the contract strictly as respects the company, and liberally as regards the insured, because the language employed is that of the insurance company. If the construction be doubt-

ful, or the meaning obscure, it is the fault of the company."

Burkheiser v. *Mutual Accident Ass'n.*, (C. C. A.), 61 Fed. 816, 26 L. R. A. 112, 114.

"It is settled, as laid down by this court in *Thompson* v. *Phenix Ins. Co. of Brooklyn*, 136 U. S. 287, 34 L. Ed. 408, that, when an insurance contract is so drawn as to be ambiguous, or to require interpretation, or to be fairly susceptibly of the two different constructions, so that reasonable intelligent men on reading the contract would honestly differ as to the meaning thereof that construction will be adopted which is most favorable to the insured."

Imperial Fire Ins. Company v. *County of Coos*, 151 U. S. 452, 38 L. Ed. 231, 235.

"But, without adopting either of these constructions, we rest the conclusion already indicated upon the broad ground that when a policy of insurance contains contradictory provisions, or has been so framed as to leave room from construction, rendering it doubtful whether the parties intended the exact truth of the applicant's statements to be a condition precedent to any binding contract, the court should lean against that construction which imposes upon the assured the obligations of a warranty. The company cannot justly complain of such a rule. Its attorneys, officers or agents prepared the policy for the purpose, we shall assume, both of protecting the company against fraud, and of securing the just rights of the assured under a valid contract of insurance. It is its language which the court is invited to interpret, and it is both reasonable and just that its own words should be construed most strongly against itself."

First National Bank v. *Hartford Fire Ins. Co.*, 95 U. S. 673, 24 L. ed. 563, 565.

"We have a case, then, for construction of these seemingly ambiguous and conflicting provisions. The tenets established for the guidance of the courts in such matters are well understood, and no one is better established than in all cases the policy must be liberally construed in favor of the assured, so as not to defeat, without plain necessity, his claim for indemnity."

Goodwin v. *Prudential Ins. Co.*, 97 Iowa. 226, 233.

"If there is a reasonable doubt as to the extent of the application of the "incontestable clause," it must be resolved in favor of the beneficiary."

Mareck et al. v. *Mutual Reserve Fund Life Ass'n.*, 62 Minn. 39, 64 N. W. 68, 69.

IV.

Effect of Death Within the Contestable Period.

The death of the insured within the contestable period does not arrest the running of the short statute of limitations adopted by the parties. The insurer must nevertheless take some "affirmative action" either by bringing suit or by making defense to a suit within the stipulated time.

This rule is supported by a number of authorities Counsel for the Packing Company have been unable to find any authority to the contrary. Nevertheless counsel for petitioner contend that the insured must live two years in order to make the incontestability clause applicable" (Brief, p. 24).

In support of this proposition, counsel do not give us the benefit of a single authority.

(1) It is the rule that the death or insanity of one who is entitled to the benefit of the general statute of limitation, does not prevent the continued running of the statute. Neither is the running of the statute arrested so as to prevent an action to rescind a contract provided the period of the statute has once begun.

In *Black* v. *Ross,* 110 Iowa, 112, 113, the court states the rule, as follows:

> "After the statute of limitations once commences to run, it is not tolled by the subsequent disability of him in whose favor the cause of action exists; or, as tersely put in *Cotterel* v. *Dutton,* 4 Taunt. 828: 'When once the statute begins to run, nothing stops it.' * * * The exception in favor of minors and insane persons contained in section 3453 of the Code applies only to such causes of action as accrue during disability. *Grether* v. *Clark*, 75 Iowa, 386; *Bishop* v. *Knowles,* 53 Iowa, 286. And such has been the construction of similar statutes in other jurisdictions. *McDonald* v. *Hovey, supra; Bradstreet* v. *Clarke,* 12 Wend. 602; *White* v. *Latimer,* 12 Tex 61. This action was not brought until ten years and ten months after the note sued on fell due, which occurred nine years and four months before Black became insane, and as the running of the statute was not interrupted or suspended by that disability it was barred by section 3447 of the Code, limiting the time within which suit on a written contract must be begun to ten years. As there is no conflict in the long line of authorities extending so far back that the memory of man runneth not to the contrary, it is quite enough to call attention to a few of these."

In *Malone* v. *Averill,* 166 Iowa 78, 83, the same court further says:

> "We then have directly presented the question: Where the cause of action was not barred at the time of the death of the party sought to be charged, but the period of limitation had fully passed before the claim was filed against the estate, is the statute of limitations tolled to the extent of one year, the time within which claims may be filed? It is the contention of the appellant as to this branch of the case that the death of the party charged arrested the running of the statute, and that if the claim was presented within the period limited by the statute for filing claims against the estate, that the plea in bar will not avail. *While there are cases outside of our state which hold to the doctrine that the death of a party tolls the right of action upon a claim not barred at such time,* and that the suit is timely if brought within the period in which claims may be filed against the estate, *this court has held differently,* applying the general rule of the statute as given in Code, Section 3447."

In *Ackerman* v. *Hilbert,* 108 Iowa, 247, it is held that the statute of limitations is not tolled by the death of a person after the statue has commenced to run in his favor.

This court in *McDonald* v. *Hovey,* 110 U. S. 619, 28 L. Ed. 269, 272, after a review of the English and American authorities with reference to the effect of certain Federal statutes of limitations, says:

> "In view of these authorities and of the principles involved in them and from a careful consideration of the language of the law itself, we are satisfied that it was not the intention of Congress

> * * * to change the rule which has always, from the time of Henry Seventh, been applied to statues of limitation, namely; the rule that no disability will postpone the operation of the statute unless it exists when the cause of action accrues; and that when the statute begins to run no subsequent disability will interrupt it."

Likewise it is held in the following cases that the death of the insured within the contestable period does not prevent the running of the period, nor release the insurer from the necessity of taking affirmative action.

New York Life Ins. Co. v. *Baker,* 83 Fed. 647, 27 C. C. A. 658.

Wright v. *Mutual Benefit Life Ass'n.,* 118 N. Y. 237, 6 L. R. A. 731, 733.

Ebner v. *Ohio State Life Ins. Co.,* 69 Ind. A. 32 121 N. E. 315, 317.

Prudential Life Ins. Co. v. *Lear,* 31 App. D. C. 184.

Jefferson Standard Ins. Co. v. *Wilson,* C. C. A. 260 Fed. 593.

American Trust Co. v. *Life Insurance Co.,* 173 N. C. 558, 92 S. E. 706.

Monahan v. *Metropolitan Life Ins. Co.,* 283 Ill. 136, 119 N. E. 68, L. R. A. 1918D. 1196.

Plotner v. *Northwestern Nat'l Life Ins. Co.,* (N. D.) 183 N. W. 1000, 1004.

Ramsay v. *Old Colony Life Ins. Co.,* 297 Ill. 592, 131 N. E. 108, 110.

Hardy v. *Phenix Mutual Life Ins. Co.,* 180 N. C. 104 S. E. 166.

In *Wright* v. *Mutual Benefit L. Ass'n.,* 118 N. Y. 237, 6 L. R. A. 731, 733, the contestable period was two years. The policy was dated December 8, 1883.

The insured died June 4, 1885, and the action was commenced March 8, 1886. No claim was made that death arrested the running of the incontestable period, although such an issue might have been presented.

In *New York Life Ins. Co.* v. *Baker,* 83 Fed. 647, 27 C. C. A. 658, the insured died within the year, and it was contended that the policy never took effect as a contract because statements to the medical examiner were false. It was held that their falsity merely rendered the policy voidable at the election of the insurer, as it provided that it should be incontestable after one year, and contained *no stipulation that a false statement should render it void.* Therefore the company could waive the breach of warranty, or could estop itself by its conduct from taking advantage thereof.

In *Jefferson Standard Life Insurance Company* v. *Wilson,* (C. C. A.) 260 Fed. 593, it was held that an insurance company which, after the death of the insured, brought suit to enjoin action on a life policy, alleging as ground for equitable relief that the policy would become incontestable a year from its date, and that action on the policy was being delayed till the expiration of the year, is estopped to claim in that suit that the running of the year for contest was suspended by the insured's death.

In *Ramsay* v. *Old Colony Life Ins. Co.,* 297 Ill. 592, 131 N. E. 108, 110, it is said:

> "It is true that the cause of action upon the policy accrues upon the death of the insured, and the policy then becomes payable according to its

terms, but *the terms of the contract are not changed by the death of the insured.* The right to contest the policy does not then become an absolute and unlimited right, but it is still controlled by the provision of the contract that it must be exercised within one year from the date of the policy. The company is not relieved from the obligation of its contract to ascertain all the facts material to its liability and cancel or rescind the contract within the time or be barred from thereafter testing the liability."

In *Plotner* v. *Northwestern Nat'l Life Ins. Co.,* (N. D.) 183 N. W. 1000, the insured died within one year contestable period. The court says:

> "So by analogy it would appear that, where in this, the defendant specified that after the expiration of one year the policy would be incontestable, the premium having been fully paid and the policy being in full force and effect from its date, unless it rescinded and repudiated it within one year from its date, thereafter, under its stipulation, it had no defense against the payment of it, excepting only for the non-payment of premium. It permitted the year and more to expire before it took any action to avoid and rescind the policy, and there being no default in the premium, it has, as before stated, no defense to the collection of the full amount of it."
>
> "The clause in question fixes the date within which any such attempt may be made by the insurer as one year from date of the policy, and it does not embrace the contingency of the lifetime of the insured. That is *it does not say that the policy shall be incontestable one year from its date during the lifetime of the insured,* but merely that it shall be incontestable after one year from its date."

In *Hardy* v. *Phenix Mutual Life Insurance Company*, 180 N. C. 180, 104 S. E. 166, the insured died within the contestable period, and the court says:

> "If, therefore, there is anything in the clause itself changing its terms or effect upon the death of the insured within one year, if the clause was inserted for the benefit of the Insurance Company to enable it to increase its business, if the period of one year after which the policy was to become incontestable was to afford opportunity to the company to make it investigations, and to commence action for the cancellation of the policy, and if during the whole of the year someone has been in existence, the beneficiary against whom an action can be brought, we see no reason for refusing to give the plaintiff the full benefit of the clause as it is written. The death of the insured did not place the defendant at any disadvantage under the policy, nor estop its investigations, nor did it affect its right to commence an action, and in most cases *death would inure to the benefit of the company, if it contemplated an action to cancel the policy by removing a hostile witness.*"

In *Monahan* v. *Metropolitan Life Ins. Co.*, 283 Ill. 136, 119 N. E. 68, L. R. A. 1918 D, 1196, it was held that the incontestable clause in a life insurance policy inures to the beneficiary after the death of the insured as much as it inures to the insured during his lifetime, and that even though some of the rights and obligations of the parties to the contract of insurance become fixed upon the death of the insured, *the rights as affected by the incontestable clause, do not become fixed at the date of the death.* It is held that *such clause continues operative for the period of time specified in the contract.*

The court says:

"Incontestable provision in insurance policies have been held valid as creating a short statute of limitations in favor of the insured, the purpose of such provision being to fix a limited time within which the insurer must ascertain the truth of the representations made. * * * This being the purpose for fixing a specified time after which the policy shall be incontestable, it is not apparent, as plaintiff in error suggests, that the meaning of the clauses here involved is that the policy shall not become incontestable until it has been in force for two years. *There is nothing in this clause to indicate that the parties were contracting that plaintiff in error should have two years during the lifetime of Fay in which to investigate and determine whether false statements had been made in the application for the insurance.* Plaintiff in error reserves two years' time in which to make such investigation, and to determine whether there has been such a breach of warranty as would authorize it to rescind its contract. * * * *The incontestable clause in a policy of insurance inures to the benefit of the beneficiary after the death of the insured, as much as it inures to the benefit of the insured himself during his lifetime.* The rights of the parties under such an incontestable clause as the one contained in this contract do not become fixed at the date of the death of the insured. In case of a breach of warranty the insurer must assert its claim within the two year period, whether the insured survives that period or not, *either by affirmative action or by defense to a suit brought on the policy by the beneficiary within the two years.*"

Ebner v. *Ohio State Life Ins. Co.*, 69 Ind. A. 32, 121 N. E. 315, 317, is a recent case. It discusses every

point involved in the case at bar. In that case the insured died before the expiration of the incontestable period. Before the expiration of that period an action was brought in equity to cancel the policy, and in that action a cross complaint was filed asking for the recovery of the amount of the policy. The court held that the insurer was under the facts entitled to have the policy cancelled. The court says:

> "Proceeding to a consideration of the case in its general features, we are first required to construe the incontestability provision of the policy, which for purposes of this case is as follows: 'After one year this policy shall be incontestable. * * *' There were certain exceptions which need not be further noticed, as they are not applicable here. It is appellee's contention that this provision should be construed to mean that a policy containing it is noncontestable after one year, provided it continues in force for that length of time, or provided it does not mature by the death of the insured before the expiration of the year; that, where the insured dies within the year, the provision has no application. Appellant, however, contends that, regardless of when the policy matures or the death of the insured occurs, a contest of the policy must be commenced within the year or it is forever barred; that, after the decease of the insured, the insurer may not contest the policy by an affirmative action, but only by a defense to a proceeding brought to enforce it; that, as a consequence, where the insured dies within the year, the representative of the insured or his beneficiary brings an action on it to enforce it, in which case the insurer may within the year, but not thereafter, commence a contest by defending against such action; that a contest seasonably and properly commenced, how-

ever, may be continued after the expiration of the year. It is apparent that the construction for which appellee contends requires that there be read into the provision something which it does not in terms contain. *Had it been the purpose of the author of the provision or the intent of the parties to the contract in consenting to it to stipulate that appellee's right to contest should be limited to a period of one year, only in case the policy continued in force for that length of time or longer, it would seem that apt language to that effect might have been employed."*

(2) *The Insurance Company could have maintained an action to cancel the policy after the death of Mr. Hurni.*

While there might be some justification for a holding, where the estate is the beneficiary, that the death of the insured has the effect of arresting the running of the conventional period, in case there is delay in the appointment of a representative of the estate of the deceased, there would be no justification for such a holding in this case because the beneficiary, the Hurni Packing Company, is a corporation, which continued in existence after the death of Mr. Hurni, and was at all times during the two-year period amenable to an action for the cancellation of the policy.

V.

Insurance company did not contest within two years.

A contest which must be made by the Insurance Company in order to arrest the running of the period of limitation must be by some "affirmative action," either

by bringing suit to cancel the policy or by making defense to an action brought upon the policy.

Did the Insurance Company take affirmative action? We contend that it did not do so within the two year period.

The date of the execution of the policy and the date from which the rights and obligations of the insured commenced to run was August 23, 1915. It follows that the expiration of the contestable period commenced on the same date and expired on August 23, 1917, unless a different rule is to be applied to the insurer from what it applied to the insured. Applying the rule we contend for, there was no contest within the two years period. Even counsel for petitioner will doubtless make that concession.

The application for insurance is dated September 2, 1915, and the date of medical examination was September 3, 1915. We contend also that the Insurance Company made no contest before September 3, 1917.

The date of the delivery of the policy is admitted to have been on September 13, 1915. We contend also that no contest was made before September 13, 1917

The record shows that after proofs of death and after demand made by the Packing Company that the policy be paid, the general solicitor of the Insurance Company wrote that "the company has evidence satisfying it that the deceased made untrue statements in his application concerning his health and attendance by physicians. In view of these untrue statements, the company *is not legally liable to pay the claim.* This

statement of the grounds of the company's action is made without prejudice to any and *all grounds of defense* that may exist."

This letter was mailed in New York City on August 24, 1917, and was received by the beneficiary on August 27, 1917 (Trans. p. 70).

Suit was commenced by the Packing Company on August 28, 1917, by the service of an original notice for the November term, and the Insurance Company by letter written August 27, 1917, was asked to make up the issues at the September term of court in order that the cause might be tried at the November term. The reply of the Insurance Company, under date of August 31st, is to the effect that "the case will be placed in the hands of local counsel at Sioux City, Iowa," and that such "counsel would be held responsible for conducting the defense" (Transcript, p. 69).

On September 20, 1917, a letter to the Insurance Company from the attorney for the Packing Company states that "the petition has been filed and I have just examined the records at the court house and find that the defendant's copy of the petition has not been removed from the files. I conclude from this, that local counsel have not been advised of the commencement of the action. I would like to be able to communicate with your local counsel but can not do so, of course, until I learn who they are" (Trans. p. 69).

Under date of September 24, 1917, the general solicitor of the Insurance Company wrote *"we have not as yet selected counsel in Sioux City.* Am I not right

in understanding that an appearance or an answer will not be due until the 1st Monday in November. However this may be, as soon as we have selected local counsel, I will be glad to advise you his name. If I am not right as to the last date for appearing and answering, I will be obliged if you will advise me" (Trans. p. 68).

The intention of the insurance company to actually contest the cause was not manifest until November 5, 1917, when a petition and bond for removal to the United States District Court was filed and the order of removal obtained (Trans. p. 9).

The first step to terminate the contract —to contest —was taken on November 12, 1917, on which date "the defendant company duly tendered to the Hurni Packing Company and Minnie B. Hurni, executrix of the last will and testament of Rudolph Hurni, deceased, the sum of $2150.00, being the amount of the premium paid to the defendant on Policy No. 2251875 together with interest thereon at the rate of six per cent from the time of payment thereof to the date of said tender" (Trans. p. 54).

It was not until December 13, 1917, that a legal contest was made by the Insurance Company and this was made by filing an answer in the cause alleging that the policy had been procured by fraud and misrepresentation and praying as follows: *"that the policy sued upon be declared null and void and of no force and validity and that plaintiff's petition be dismissed at its costs"* (Trans. p. 15).

These facts are undisputed and they indicate a *determination* on the part of the Insurance Company *to*

defer to the very latest possible date the defense which they thought they had to the policy and a determination to avoid as long as possible making known the exact nature of their defense. It was not until November 12, 1917, that the first step was taken to cancel the policy by tendering back the premiums paid and this tender was kept good by pleading it in their answer and by asking that the policy be declared null and void.

In view of this record of what was done can there be any doubt that the contest of the policy within the contemplation of its terms was not commenced by the petitioner until November 12, 1917?

(1) *It is evident from the foregoing that the insurance company, not only failed to contest within the two-year period, but it persistently put off the date of the contest till the very last moment for reasons not readily discernable.*

In the letter of the insurance company of August 24 (Transcript. p. 81), it did not even state that it would contest the policy. It only stated that "Payment was declined on the ground, among others, that the deceased made untrue statements." One may "decline" to pay his note for some fancied grievance, but such declination would hardly be considered a "contest."

> "When the execution of a contract has been procured by the fraud of one of the parties, the innocent party, upon discovering the fraud, may still insist upon the contract or may rescind it. He must, however, if he desires to repudiate it, do so promptly upon discovering the fraud and con-

sistently adhere to his intention. By delay or vacillation he waives his right to rescind."

Ramsay v. *Old Colony Life Ins. Co.*, 297 Ill. 592, 131 N. E. 108, 109.

"It has also been properly said: Such 'a stipulation * * * ought to be an incentive for the insurer to exercise vigilance and good faith in investigating the truth or falsity of the representations upon which the policy is issued, while the matter is fresh (and thus it operates fairly between the parties). The witnesses are all alive, and the exact truth can, if ever, be ascertained, and the stipulation prevents the insurer from lying by and receiving the premiums during the life of the insured, and after his death, when the good faith and the truth of his representations cannot be supported by his own oath (and strengthened by his own efforts and superior knowledge), contesting the policy upon the ground that the insured's representations were false or untrue. Such stipulation is neither unreasonable nor contrary to public policy.' It is true, there is in the policy a stipulation that a fraud shall vitiate it; but this is not inconsistent with the further requirement that the insurer must set up the fraud in the time limited. * * * Fraud is always required to be set up promptly when discovered, or it may be treated as waived; and the effect of this stipulation is that the insurer must exercise due diligence to discover such fraud within the year, and, if it fails to do so, it will treat it as waived, and no inquiry will be made or allowed into such matters."

Clement v. *New York Life Ins. Co.* (Tenn.) 46 S. W. 561; 42 L. R. A. 247, 249.

"By the clause in question appellant took one year for the purpose of investigating and determining whether it would exercise its right to repudiate and rescind its contract on the ground it is now

interposing as a defense. If it had exercised any diligence, and the insured's physical condition was that now claimed by the appellant, it might easily have discovered such condition within the time reserved by it for that purpose. If it failed to exercise vigilance in this respect, it must be treated as having waived its right to deny liability on such ground."

Commercial Life Ins. Co. v. *McGinnis*, 50 Ind. A. 630, 97 N. E. 1018, 1019.

(2) *The Insurance Company must "contest" the policy by taking some affirmative action, either by making defense to an action brought to recover on the policy, or by an action brought by the insurer to cancel or rescind the contract.*

Moran v. *Moran*, 144 Iowa, 451.

Ramsay v. *Old Colony Life Ins. Co.*, 297 Ill. 592, 131 N. E. 108.

Monahan v. *Metropolitan Life Ins. Co.*, 283 Ill. 136, 119 N. E. 68; L. R. A. 1918 D 1196 note.

Jefferson Standard Life Ins. Co. v. *Wilson* (C. C. A.), 260 Fed. 593.

Black on Rescission and Cancellation, Vol. 2, p. 1155.

Ebner v. *Ohio State Life Ins. Co.*, 69 Ind. A. 32; 121 N. E. 315, 319, 320.

Mass. Benefit Life Ins. Co. v. *Robinson* (Ga.), 30 S. E. 918, 42 L. R. A. 261.

Indiana National Life Ins. Co. v. *McGinnis*, 180 Ind. 9, 101 N. E. 289; 45 L. N. S. 192, 196.

Commercial Life Ins. Co. v. *McGinnis*, 50 Ind. A. 630, 97 N. E. 1018, 1019.

Wright v. *Mutual Ben. Life Ins. Co.*, 43 Hun. 61 (quoted in *Mass. Ben. Life Ass'n.* v. *Robinson*, (Ga.) 42 L. R. A. 261, 269).

Duvall v. *National Life Ins. Co.*, 28 Idaho 356, 154 Pac. 632; L. R. A. 1917 E. pp. 333, 339.

American Trust Co. v. *Life Ins. Co.*, 173 N. C. 558, 92 S. E. 706.

Murray v. *State Mutual Life Ins. Co.*, (R. I.) 48 Atl. 800, 53 L. R. A. 742, 743.

Mutual Life Ins. Co. v. *Buford*, (Okla.) 160 Pac. 928.

"While 'contest' as used in statutes, may be treated as 'a word of art,' it is hardly such in ordinary use and signification. The definition by Webster is 'to make a subject of dispute; to call in question; to dispute.' It is frequently used in the sense of, 'to ltigate,' 'oppose,' 'to challenge,' 'to resist,' and, *as applied in legal proceedings it ordinarily implies a dispute between parties plaintiff nnd defendant before a court* which is to decide the question put in issue. It is the contention of appellant that the words 'shall contest the same' as employed by the testator in the will before us ought to be construed as referring to a direct assault upon the entire instrument as a will, upon grounds which if established would render it void in all its parts. That such an attack would be a contest of the will is certain, but that an attack upon the validity of a material part of the will which, if successful, would destroy the integrity of the plan adopted by the testator for the distribution of the estate, is not also a contest within the fair meaning of the words, cannot be conceded."

Moran v. *Moran*, 144 Iowa, 451, 464.

"Such contest can be made only by proceedings in court to which the insurer and the insured or his representatives or beneficiaries, are parties."

Ramsay v. *Old Colony Life Ins. Co.*, 297 Ill. 592, 131 N. E. 108, 110, citing

American Trust Co. v. *Life Ins. Co.*, Va. 173 N. C. 558, 92 S. E. 706.

Mutual Life Ins. Co v. *Buford,* (Okla.) 160 Pac. 928.

In *Jefferson Standard Life Ins. Co.* v. *Wilson,* (C. C. A.) 260 Fed., 593, the appeal was from the action of the District Court for the Southern District of Georgia. The policy provided that it should be incontestable "After one year from date." The action was one to enjoin the beneficiary from bringing suit on the policy and asked that the policy be cancelled for false statements made by the insured in his application. The insured had died within the year. The company claimed that the year had not expired because the action to cancel was commenced within a year from the beginning of the "initial term" of the policy. The court says:

> "Considering together the several papers evidencing the transaction, the conclusion is that the provision in question had the effect of making the policy incontestable after one year from the date of the policy becoming effective. As the policy had been in force for more than a year when the insurer undertook to contest it *by suit,* the asserted right to contest it on the ground relied on was barred by the expiration of the time allowed for contest."

In this case the beneficiary threatened to wait till after the expiration of the year before commencing the action, and the insurance company having sought the injunction to restrain the action on the policy on the theory that the limitation period was running after the death of the insured, the insurer was held estopped from

claiming that the statute did not continue to run after the death of the insured.

> "An examination of the following cases will show that the holding of the courts of this country has been almost universally that every defense to a policy of insurance embraced within the terms of the 'incontestable clause' in *completely lost to the insurer, if it fails to make the defense or take affirmative action within the time limited by the policy.*"
>
> *Indiana Nat'l Life Ins. Co.* v. *McGinnis,* 180 Ind. 9, 101 N. E. 289, 291, 45 L. N. S. 192.

In support of this statement of law the court cites, among a number of cases, the following:

Wright v. *Mutual Ben Ass'n,* 118 N. Y. 237, 6 L. R. A. 731.

Reagan v. *Union Mutual Life Ins. Co.,* 189 Mass. 555, 76 N. E. 217, 2 L. N. S. 821.

Mutual etc. Ass'n v. *Austin,* 142 Fed. 398, 6 L. N. S. 1064.

New York Life Ins. Co v. *Baker,* 83 Fed. 647, 27 C. C. A. 658.

Teeter v. *United etc. Ins. Ass'n,* 159 N. Y. 411, 54 N. E. 72.

In *Mutual Life Ins. Co.* v. *Buford,* (Okla.) 160 Pac. 928, the court quotes with approval *Indiana Life Ins. Co.* v. *McGinnis,* 180 Ind. 9, 101 N. E. 289; 45 L. N. S. 192, including the statement that:

> "An examination of the following cases will show that the holding of the courts of this country has been * * * invariably that every defense to a policy of insurance embraced within the terms of the 'incontestable clause' is completely lost

to the insurer, *if it fails to make the defense, or take affirmative action within the time limited by the policy.*"

In *Wright* v. *Mutual Ben. Life Ass'n,* 43 Hun. 61, it is said:

> "An action for the recovery of the sum insured not being maintainable until after the death of the insured, one effect of the stipulation, if valid, is to prevent the insurer from interposing as a defense the falsity of the representations of the insured. But its effect is not to prevent the insurer from annulling the contract upon the ground of the fraudulent representations of the insured, *provided an action for that purpose is brought in the lifetime of the insured,* and within two years from the date of the policy. The practical and intended effect of the stipulation is, as held by the trial court, to create a short statute of limitations in favor of the insured, within which limited period the insurer must test, if ever, the validity of the policy."

In *American Trust Company* v. *Life Ins. Co.,* 173 N. C. 558, 92 S. E. 706, the action was one brought to recover on a policy of insurance containing the following clause: "This policy shall be incontestable after one year from its date, except for non-payment of premium." Within 12 months of the date of the policy the company notified the insured that it elected to cancel the policy, and tendered the return of the premium, on the ground that it had discovered facts which, in its opinion rendered the policy void, but it refused, on the request of the insured to state what the facts were. The insured died within the year. No action was brought by

the company to have the policy cancelled. In this case the court says:

> "It follows, therefore, that the conduct of the defendant in notifying the insured that it would cancel the policy and in tendering the first premium which had been paid, did not rescind or cancel the contract, as the plaintiff did not consent thereto, and amounted to no more than a breach, and that the remedy of the defendant was to institute an action for cancellation within the year, and as it did not do so, the policy was in force at the expiration of the year. This is also in accordance with the authorities holding that if the defendant wishes to contest, and to avoid the payment of the policy and the force of the incontestable clause, *it must take affirmative action within the time limited by the policy.*"

In this case the court quotes from *Insurance Company* v. *McGinnis,* 180 Ind. 9, 101 N. E. 289, 45 L. R. A. (N. S.) 192; *Murray* v. *Ins. Co.,* 48 Atl. 800, 53 L. R. A. 742; *Wright* v. *Mutual Ins. Co.,* 43 Hun. 61, affirmed in 118 N. Y. 237 and *Insurance Co.* v. *Robinson,* (Ga.) 30 S. E. 918, 42 L. R. A. 261.

> "Viewing the question from all sides, it is our judgment that the provision under consideration must be construed in harmony with appellant's contention; that the language used is not so ambiguous as to call for the insertion of modifying or limiting clauses in order that its meaning may be determined; that by virtue of such provision time is afforded the insurer within which to conduct the necessary investigation to determine the existence of any fact upon which the invalidity or nonbinding force of the policy may be predicated. It does not follow, however, that we concur in appellant's

views respecting the rights of the parties under such a construction, but rather that *if*, as a result of such investigation or of knowledge otherwise obtained, *the insurer desires to contest the policy, appropriate steps to that end, either by a defense to an action brought on the policy in case of the death of the insured, or by proper affirmative action, must be taken within the year.*"

Ebner v. *Ohio State Life Ins. Co.*, 69 Ind. A. 32, 121 N. E. 315, 320.

The Supreme Court of Illinois in the *Ramsey* v. *Old Colony Life Ins. Co.*, 297 Ill. 592, 131 N. E. 108, says with reference to the subject of "contest" in the *Ebner case*, as follows:

"The trial was actually on the cross complaint and the issues made on it, but the Appellate Court held that the filing of the complaint in a court of equity alleging the fact of the incontestable provision and that the defendant intended to delay the action on the policy for the purpose of depriving appellee of its defense was sufficient to invoke the jurisdiction of a court of equity, and that it sufficiently appeared that within the year the appellee proceeded by affirmative action to contest the policy, and that the contest was continued thereafter, without interruption, until its final conclusion in the County Court. While the judgment was actually rendered on the policy and on the issues made on the cross complaint for its enforcement the court, in effect, sustained the equitable jurisdiction of a suit to cancel the policy after the death of the insured within the contestable period and treated the case as a proceeding to contest liability on the policy from the date of the filing of the original complaint."

It is therefore quite evident that what was done in the Ebner case was "affirmative action" taken to contest the policy. The fact situation was therefore quite different from what it is in the case at bar where the *insurance company for the period of three months after the discovery of the alleged fraud, persisted in doing nothing whatsoever,* although urged to act by the packing company, and finally resorted to its "constitutional right and privilege" as a citizen of another state, to remove the cause from the state court to the federal court.

(3) *Right to, and denial of, equitable relief.*

Even if, on account of the death of the insured, the insurer is not able to maintain an action in equity to cancel the policy, it does not extend the time within which contest may be made, unless it can be shown that the action of the beneficiary to recover on the policy is purposely delayed in order to permit the contestable period to elapse.

In a few cases the courts have given consideration to the fact that where the policy is payable to the estate of the insured and the administrator was not appointed till after the expiration of the stipulated period, and it has been held that such fact entitled the insurer to have the time correspondingly lengthened. It must be remembered, however, *in the case at bar, the beneficiary is a corporation, and the death of Mr. Hurni did not in any way prevent an action against the beneficiary, the Hurni Packing Company, the plaintiff in the action.* Moreover, even if it should be considered that Mr. Hurni was a necessary party to an action to rescind brought in his

lifetime, there is no showing, that, he having died testate, an executor was not appointed promptly upon his death.

> "It is the settled law of this circuit (eighth), and of the Supreme Court, that after the death of the insured a suit in equity will not lie for the surrender and cancellation of the policy upon the ground that it was obtained by fraud, for the reason that the company has a plain, speedy and adequate *remedy by interposing the fraud as a defense to an action at law upon the policy.*"
>
> *Greisa* v. *Mutual Life Ins. Co.*, (C. C. A.) 169 Fed. 509, 513.
>
> *Riggs* v. *Marine Life Ins. Co.*, (C. C. A). 129 Fed. 207.
>
> *Mutual Life Ins. Co.* v. *Greisa*, 156 Fed. 398.
>
> "After the death of the insured, the grounds of contest stated in the bill were available to the appellant by way of defense to an action against it on the policy. This being true, the appellant was not entitled to equitable relief, in the absence of *special circumstances* showing that it might suffer irreparable injury unless such relief was granted" (*Insurance Company* v *Bailey*, 13 Wall. 616, 20 L. ed. 501).
>
> *Jefferson L. Ins. Co.* v. *Wilson*, (C. C. A.) 260 Fed. 593, 595.

In *Bankers Reserve Life Company* v. *Omberson*, 123 Minn. 285, 143 N. W. 735. The action was to cancel the policy for fraud or to restrain an action at law thereon. It was held that the action could not be maintained in the absence of some special circumstances of a nature to cause irreparable loss to the plaintiff if he is relegated to his remedy at law by way of defense to an action on the policy. In this case the court says:

"In *Cable* v. *United States L. Ins. Co.,* 191 U. S. 288, 48 L. Ed. 188, the facts were the same, except that an action at law on the policy had been begun before the equity suit was commenced. *Phoenix Mutual L. Ins. Co.* v. *Bailey* was approved and followed. * * * The former case was decided by the United States Circuit Court for the District of Minnesota in 1870; Circuit Judge Dillon writing the opinion, Mr. Justice Miller concurring. The case is a leading one and is persuasive. Some reliance is placed in the opinions upon the limitations in the policy as to the time of bringing suit; Mr. Justice Miller saying that this, *and the allegation that defendants were threatening to sue at law, showed there was no danger of indefinite delay"*

In *Monahan* v. *Metropolitan Life Ins. Co.,* 283 Ill. 136, 119 N. E. 68, L. R. A. 1918 D. 1196, 1198, it is said:

"It is suggested that the construction contended for by defendant in error might work a hardship upon the insurer where policies are made payable to the legal representative of the insured, as in this case, as, where knowledge of a breach of warranty is acquired after the death of the insured, so short a time might elapse between the date of death of the insured and the termination of the two-year period that it would be impossible to secure that appointment of a legal representative, and the insurer would be helpless to effect a rescission of cancellation of the contract, should it desire to do so. Such a situation does not exist in this case. *The administrator in the estate of Fay was appointed in apt time, and before the expiration of the two-year period.* Plaintiff in error had ample time, if it desired to do so, to take such action as it should see fit for the cancellation of the

policy upon the ground that the representations made by Fay in his warranties were false. It cannot complain if, by reason of its own language inserted in the contract, it has created a situation which in some instances might make it more difficult for it to assert and maintain its rights."

In *Phoenix Mutual Life Ins. Co.* v. *Bailey*, 13 Wall. 616, 20 L. Ed. 501, it is said:

> "Where a party, if his theory of the controversy is correct, has a good defense at law to a 'purely legal demand,' he should be left to that means of defense, as he has no occasion to resort to a court of equity for relief, unless he is prepared to allege and prove some *special circumstances* to show that he may suffer irreparable injury if he is denied a preventive remedy."

The last case is quoted with approval in the case of *Ramsay* v. *Old Colony Ins. Co.*, 297 Ill. 592, 131 N. E. 108, 111, where it appeared that there were "special circumstances" in that beneficiaries could defeat the right of the company to set up the defense at law by refraining from suit until after the expiration of the incontestable period, and it was held that the company could maintain a suit in equity against the beneficiary or personal representative of the insured to establish their defense against the policy. In this case the court, however, says:

> "When the insured died on April 13, 1917, 7 months of the year after the policy was issued had elapsed. The administrator was not appointed until July 19, 1918. After that there was nothing to prevent the defendant from contesting its liability on the policy. Suit was begun against it in November, 1918, but it filed no plea denying its

liability upon the policy until May 12, 1919, nearly ten months after the appointment of the administrator and, excluding the time during which it was prevented from bringing suit by reason of the failure to appoint an administrator, nearly 17 months after the date of the policy. The plea alleged that knowledge of the falsity of the answers did not come to the defendant till July 1, 1918, but there were several months after its discovery of the fraud and after the appointment of the administrator before the expiration of the year in which it might have filed a bill to cancel the policy. It failed to do so and by its neglect permitted the incontestable period fixed by the policy, even under the construction which we have given it, to elapse. It was therefore barred by its contract from making the defense it sought to make and the demurrer to the plea was properly sustained."

(4) Is the petitioner entitled to take advantage of the claim that there are *"special circumstances" on account of which it could defer making defense to the action brought in the state court from August* 28, 1917, *to December* 13, 1917, *without waiving its right to make defense.*

A case decisive of this point, as well as of a number of others is the case of *Cable* v. *United States Life Ins. Co.*, 191 U. S. 288, 48 L. Ed. 188, cited by counsel for petitioner, and it has been left till the last to be quoted at length. That case was an action brought by the insurance company in the Circuit Court of the United States against the administratrix of the insured to cancel a policy of insurance on the ground that it was procured by the fraud of the agent. The company was a non-

resident of the State of Illinois where the administratrix had commenced suit on the policy in the state court but was licensed by that state to transact business therein. The Illinois Legislature had passed a law to forfeit the right to do business in the state by any insurance company which sought to remove an action against it brought in the state court. It was contended by the insurance company as a reason why it was entitled to equitable relief, that while it had the right of removal, it would be hazardous to the company; that the position of the defendant in an action is not as advantageous as that of the plaintiff, as the plaintiff has the conduct of the case largely within its own control, and that the law as administered in the state court was not as favorable to insurance companies as the law administered in the federal court and that the company had the right to the benefit of the administration of the law in the federal court on account of the diversity of citizenship which existed. The court first quotes from *Phoenix Ins. Co.* v. *Bailey*, 13 Wall. 616, 20 L. Ed. 501, as follows:

> "By the death of the *cestui que vie* the obligation to pay, as expressed in the policies, became fixed and absolute, subject only to the condition to give notice and furnish proof of that event within ninety days. Notice having been given and the required proof furnished, the obligation to pay certainly became fixed by the terms of the policies, and the sums insured became a purely legal demand, and if so, it is difficult to see what remedy more nearly perfect and complete the appellants can have than is afforded them by their right to make defense at law, which secures to them the right of

trial by jury. Where a party, if his theory of the controversy is correct, has a good defense at law to a 'purely legal demand,' he should be left to that means of defense, as he has no occasion to resort to a court of equity for relief, unless he is prepared to allege and prove some special circumstances to show that he may suffer irreparable injury if he is denied a preventive remedy." * * *

The court then says:

"Complainant insists that in this case *special circumstances* are shown that it may suffer irreparable injury if jurisdiction be denied. Those special circumstances have already been mentioned, and the question is whether they are sufficient to furnish ground for a federal court of equity to take jurisdiction herein.

"We start with the proposition that, to any action brought upon the policy in a federal court, the company would have a complete and adequate defense by proving the fraud as alleged in the bill herein. That shows a defense in the same jurisdiction resorted to by the complainant herein. It is answered, however, that the action has not been commenced in the federal court, but, on the contrary, the administratrix has commenced her action in the state court, and hence the defense, if made in the state court, is not in the same jurisdiction as that in which the bill in this case was filed. But the company may bring its defense within the same jurisdiction by removing the case from the state to the federal court, which it has the right to do on account of the diversity of citizenship of the parties thereto. * * * We think the existence of these facts furnishes no ground for appealing to a federal court of equity to take jurisdiction of a suit to cancel the policy, where otherwise the court would have none. The state statute could not prevent the removal. If, because of a removal, ground was

furnished for the revocation of the license, that fact would not justify a resort to a federal court, and ought not to, because as we have said already, *the contingency is one of the complainant's own creation, and it ought not therefore, to be able to avail itself of an embarrassment which it has voluntarily created, as a foundation for jurisdiction in a federal court which would not otherwise exist.* * * *

"Still less do we think that any foundation is laid for that jurisdiction based upon the theory that the company would not have the same control of the case as a defendant that it would as plaintiff. That is not the case in modern practice. The defendant can urge the case to trial against the desires of the plaintiff, and its defense may be shown as well and conveniently by a defendant as the cause of action may be shown by the plaintiff. The right of the plaintiff to discontinue the action does not furnish ground for equitable jurisdiction. If it did, then equity would always have jurisdiction, and the rule would be worthless."

It follows that the contention on the part of counsel for petitioner that the running of the contestable period stopped with the death of Mr. Hurni is not warranted because it is not shown on the part of the Insurance Company that "special circumstances" existed warranting an action in equity to cancel the policy, because there is no showing that there was any delay in bringing an action at law by the Packing Company to recover on the policy; that on the contrary it is shown that the action was brought the day following the receipt of the letter of the Insurance Company declining to pay the policy, and the Insurance Company did nothing for two months after the delivery of the policy, if the date of

delivery is to be taken as the date of the commencement of the contestable period.

VI.

Effect of First Trial and First Appeal.

The Insurance Company was the plaintiff in error when this cause was before the Circuit Court of Appeals after the first trial below. The assignment of errors was in substance that the trial court erred in directing a verdict for the Packing Company and in refusing to direct a verdict for the Insurance Company.

The Circuit Court of Appeals in its opinion in the case (260 Fed. 641), in conclusion says:

> "The answer having been untrue, and the matter material, and the maker of the statement necessarily knowing that it was untrue when he made it, *the intention to deceive the insurer is necessarily implied as the natural consequence of such act.* * * * On the evidence as presented the court should have directed a verdict for the defendant."

In other words, that court said that as a matter of law, "The intention to deceive the insurer is necessarily implied as the natural consequence," of the untrue statement made as to consultation with physicians.

That court appeared to have arrived at that conclusion notwithstanding the undoubted rule to the contrary, adopted by the Iowa Supreme Court, as set forth in a number of cases, including the following, wherein the facts were very similar—if not identical:

Ley v. *Metropolitan Life Insurance Co.*, 120 Iowa, 203, 210.

Lakka v. *Modern Brotherhood*, 163 Iowa, 159, 170.
Murphy v. *National etc. Ass'n.*, 179 Iowa, 213, 222 (179).
Smith v. *Packard Co.*, 152 Iowa, 1, 6.

It being the rule in Iowa that the presumption of intent is not conclusive, even if it is shown that the insured had knowledge of the falsity of the representation, we insist that the Circuit Court of Appeals should have followed that rule, in accordance with the holdings of the federal courts that they will follow the rule adopted by the courts of last resort of the state where the cause of action arose, especially in insurance cases. That is the rule of the following cases:

John Hancock Life Ins. Co. v. *Warren*, 181 U. S. 73, 45 L. Ed. 755.
New York Life Ins. Co. v. *Cravens*, 178 U. S. 389, 44 L. Ed. 1116.
Equitable Life Assur. Soc. v. *Brown*, 213 U. S. 25, 53 L. Ed. 682.
McClain v. *Provident etc. Ass'n.*, 49 C. C. A., 29; s. c. 184 U. S. 699, 46 L. Ed. 765.
Orient Ins. Co. v. *Daggs*, 172 U. S. 577, 43 L. Ed. 552.

The Hurni policy was an Iowa contract, although the insurer is a New York corporation. The general rule is that "the state where the application is made and where the premium is paid and the policy delivered is that where the contract was entered into."

Mutual Life Ins. Co. v. *Cohen*, 179 U. S. 262, 45 L. Ed. 181.
New York Life Ins. Co. v. *Russell*, (C. C. A.) 77 Fed. 94.

Albro v. *Manhattan Life Ins. Co.*, (C. C. A.) 119 Fed. 629.
Equitable Life Ins. Co. v. *Winning*, (C. C. A.) 58 Fed. 541.
Fletcher v. *New York Life Ins. Co.*, 13 Fed. 526.

It will be noted that in the opinion of the court upon the first appeal the only Iowa decision cited to sustain its conclusion, that "the intent to deceive the insurer is necessarily implied as the natural consequence of the act," was the case of *Boddy* v. *Henry*, 126 Iowa, 31. In relying upon that case for the rule, with reference to intent in actions involving fraud the Circuit Court of Appeals was unfortunate, for the reason that *Boddy Case* had been "explained" prior to the time when the court rendered its decision, as clearly appears from the more recent case of *Smith* v. *Packard & Co.*, 152 Iowa, 1, 6, where it is said:

> "Plaintiff complains of this instruction. He urges that he was not required to prove an intent to deceive. In support of this contention, reliance is placed upon *Boddy* v. *Henry*, 126 Iowa, 31. Counsel misconceives the purport of the holding in that case. Intent to deceive is necessarily the gist of an action of deceit. The burden of proving it is necessarily upon the plaintiff. The method of proving it is quite another question. It is always an element of plaintiff's case, necessary to be alleged, and therefore necessary to be established. * * * Some courts have gone to the extent of holding *that the presumption of intent is conclusive, if* knowledge of the falsity of the representation is shown, but such is not the rule adopted in the majority of jurisdictions, and it *is not the rule in this*

> *state.* The fact, therefore that the intent to deceive may be presumed or inferred from the defendant's knowledge of the falsity of the representation does not eliminate it as an element from plaintiff's case, nor does it relieve him from the burden of proof thereon. The fact remains that before he can recover *the jury must find from the evidence as a whole, in the light of all the circumstances shown, that the defendant intended to deceive."*

Upon the second trial of the case below, counsel for the Packing Company attempted to show and we believe did show circumstances to convince both the court and jury that there was no intent on the part of Mr. Hurni to deceive. *If any presumption of intent* to deceive was "necessarily implied" from what he said and did, *it was fairly rebutted* by the testimony of the agent who took Mr. Hurni's application. *This testimony is in addition to the testimony taken at the first trial and before Court of Appeals on the first appeal,* all of which original testimony was offered and introduced in evidence on the second trial, and is a part of the record in this case (Trans. pp. 54-59).

This evidence coupled with the evidence of the other witnesses, showing the personal traits and character of Mr. Hurni, clearly indicates that an intent to defraud the insurer was entirely foreign to his thought and purpose. We call this evidence to the court's attention for the purpose of showing its materiality and for the purpose of showing that the *record as a whole as it now stands is substantially different,* on the subject of Mr. Hurni's intention, from what it was when the cause was before

this court on the first appeal, and for the purpose of showing that while the rule as to the "law of the case" is as counsel for petitioner suggests, it should not be applied in this case as the record now stands.

It is only where the evidence is the same that the rule referred to is applied and even then the rule has its exceptions. The application of this rule is the subject of a very extended note to the case of *U. S. Annuity etc. Co.* v. *Peak*, 129 Ark. 43, 195 S. W. 392, 1 A. L. R. 1259, 1270. See also *Messinger* v. *Anderson*, 225 U. S. 436, 56 L. Ed. 1152.

Had there been no additional testimony on the part of the plaintiff to rebut the presumption of intent, in view of the rule which the Circuit Court of Appeals established as the law of the case by its opinion on the first appeal, then it might be claimed, that the fact situation on the second appeal, with reference to fraud was the same as it was on the first appeal. Such claim, however, cannot now fairly be made. In other words the respondent has brought itself, in this respect, within the rule adopted in the case of *New York Life Ins. Co.* v. *Wertheimer*, 272 Fed. 730, 734, where it is said:

> "A positive statement of fact, falsely made, with respect to a material matter, will, *nothing else appearing*, be deemed to have been made wilfully and with intent to deceive."

It may be claimed that this division of the argument is uncalled for, in view of the fact that, in reality, the question of the effect of the incontestability clause of the policy alone is involved. Our justification in giving

consideration to the subject is for the purpose of calling to the court's attention to the fact that the rule adopted by the court on the first appeal was based upon an evident misapprehension of the Iowa rule as to necessity of showing intent to defraud as a matter of fact, and for the purpose of showing clearly that the facts relating to and bearing upon the intent of the insured are different from what they were on the former appeal, and that there was, therefore, no reason for the trial court sustaining, at the second trial, as counsel for petitioner insists it should have done, its motion for a directed verdict because of "the law of the case" adopted by this court on the first appeal, or for any other reason.

Otherwise stated, the plaintiff on the second trial was able to show what is believed to be the necessary "countervailing circumstances," using the expression of the writer of the majority opinion on the second appeal.

Effect of Remand for New Trial; Amendment.

After a cause has been remanded for new trial the pleadings may be amended so as to present new issues.

The order of Circuit Court of Appeals, on the first appeal, was as follows:

> "The judgment of the lower court is therefore reversed and a new trial ordered."

After the reversal, the plaintiff asked leave of court to amend its reply to the answer of the defendant, in which it set up the defense of fraud and misrepresentation, and the trial court granted such permission. Ac-

cordingly on June 2, 1920, the plaintiff filed the amendment stating that "the defendant failed to contest the policy of life insurance payable to the plaintiff, by the tender of the return of the premium paid or otherwise, within the two year period in which the policy might be contested as provided by the terms thereof, and it is now barred from setting up or urging any of the defenses set forth in the answer."

The plaintiff in error saved no exception and predicated no error upon the ruling of the court permitting the filing of the amendment.

At the close of the testimony taken at the trial, had on the 19th, 20th, 21st and 22nd days of October, 1920, the plaintiff's motion for a directed verdict, based upon the ground that the evidence showed that "the defendant did not within the contestable period take any affirmative action to cancel the policy or take any action whatsoever to cancel or annul the same, and in fact, failed to tender back the premium until the 12th day of November, 1917, or take any steps whatsoever for the purpose of contesting, cancelling or rescinding the policy of insurance upon which this action is brought upon any grounds set up as a defense" (Trans. p. 17), was sustained and the defendant's motion to direct a verdict on various grounds was overruled.

Counsel for petitioner now claim that the Packing Company was estopped from raising the question as to whether the insurance company did or did not contest the policy within the stipulated time because, as it claims, the question was not raised at the first trial.

It is a well established rule that either party has the right, within the discretion of the court, to amend his pleadings after a cause has been remanded for re-trial. In other words, the cause stands for trial as if no previous trial had been had, with the exception that the law as stated by the appellate tribunal must be followed. The only estoppel which the authorities recognize is the estoppel, if it may be so termed, created by the law as pronounced by the appellate court. That is not such an estoppel as to prevent one from changing the pleadings, if he shall elect to do so.

> "After a cause is remanded to the trial court, that court may receive such additional pleas and admit amendments to those already filed as may appear to be proper."
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> 21 R. C. L. p. 590.
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> *Marine Ins. Co.* v. *Hodgson*, 6 Cranch 206, 3 L. Ed. 200.
>
> *Tremaine* v. *Hitchcock*, 23 Wall. 518, 23 L. Ed. 97.
>
> *Adams County* v. *Burlington, etc. Co.*, 44 Iowa 335.

Conclusion.

In this brief and argument we have endeavored to sustain each conclusion by the citation of authorities which, at least, challenge attention. We do not ask the court to determine this case by arguments as if the points involved were only those of "first impression." We believe that we are amply justified in stating that

every point made by adverse counsel has been fully met and answered by a sufficient number of "authorities directly in point." We feel, therefore, that we are entitled to ask that the action of the Circuit Court of Appeals be affirmed.

Respectfully submitted,

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